TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 372.

HENRY O. HOUGHTON, TRUSTEE, GEORGE E. MITCHELL, J. MURRAY KAY, ET AL., APPELLANTS,

vs.

HENRY C. PAYNE, POSTMASTER GENERAL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JULY 26, 1909.

(19,023.)

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In the Court of Appeals of the District of Columbia.

HENRY C. PAYNE, Postmaster General, Appellant,
vs.
HENRY O. HOUGHTON, Trustee, *et al.*
} No. 1303.

a Supreme Court of the District of Columbia.

HENRY O. HOUGHTON, Trustee; GEORGE H. MIFFLIN, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton, and Albert F. Houghton, Complainants,
vs.
HENRY C. PAYNE, Postmaster General.
} No. 23342. In Equity.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Bill of Complaint.*

Filed May 31, 1902.

Supreme Court of the District of Columbia.

HENRY O. HOUGHTON, Trustee; GEORGE H. Mifflin, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton, and Albert F. Houghton
vs.
HENRY C. PAYNE, Postmaster General.
} In Equity. 23342.

To the honorable the supreme court of the District of Columbia, sitting in equity:

Henry O. Houghton, trustee, of Cambridge, George H. Mifflin, of Boston, J. Murray Kay, of Brookline, and said Henry O. Houghton, all in the State of Massachusetts, Lucy H. Valentine, of New York in the State of New York, Oscar R. Houghton, of Riverside in the State of Connecticut, and Albert F. Houghton, of said New York,

copartners doing business under the firm and style of Houghton, Mifflin and Company, bring this their bill of complaint against Henry C. Payne, Postmaster General of the United States.

And your orators complaining say:

1. That your orators are each citizens of the United States:

That the respondent is a citizen of the United States holding the office of Postmaster General of the United States.

2. That heretofore and on the seventeenth day of March, 1886, your orators were and ever since have been engaged in the
2 business of printers and publishers of books and periodicals of the Riverside Press in said Cambridge, having their office of publication at four Park street in said Boston, and that said office of publication was and is well known.

3. That as such publishers they are now and since said seventeenth day of March 1886, have been engaged in printing and publishing a series of periodical publications known and described as "Riverside Literature Series."

That these publications, each and every of them, since said seventeenth of March 1886, to the filing of this bill, have been regularly issued at stated intervals as frequently as four times a year, have borne date of issue, have been numbered consecutively, and have been issued from the known office of publication of your orators hereinbefore set forth;

That these publications, each and every of them, have been formed of printed paper sheets, without boards, cloth, leather, or other substantial binding such as distinguish printed books for preservation from periodical publications;

That these publications, each and every of them, have been devoted to literature, have had a legitimate list of subscribers, and have not been designed primarily for advertising purposes, or for free circulation or for circulation at nominal rates, and your orators in the publication and issue of these publications have complied with all the terms conditions and requirements of the laws of the United States relating to mailable matter of the second class;
3 and your orators file herewith copies of said publications which, in respect to the requirements of mailable matter of the second class, are similar to each and every other of said publications.

4. That of these publications already issued Nos. 1–18 were issued weekly to July, 1886, Nos. 19–42 monthly to April, 1889, Nos. 43–62 quarterly to April, 1894, Nos. 63–116 semi-monthly to May, 1897, Nos. 117–143 monthly to May, 1900, Nos. 144–151 quarterly to April, 1902. That from said March 17, 1886, to the filing of this bill these publications have been recognized, entered and admitted by the successive Postmaster Generals of the United States as mailable matter of the second class, and have been conveyed in and by the mails of the United States at the rates prescribed for mailable matter of the second class, the last certification thereof being upon the change to a quarterly issue in the year 1900, and being as follows:—

3505.

Certificate of Entry of Publication as Second Class Matter.

POST OFFICE AT BOSTON, *Sept.* 15, 1900.

I hereby certify that the Riverside Literature Series, a quarterly published at this place, has been determined by the Third Assistant Postmaster General to be a publication entitled to admission into the mails at the pound rate of postage, and entry of it as such is accordingly made upon the books of this office. Valid while the character of the publication remains unchanged, or until revoked.

GEORGE A. HIBBARD, *Postmaster*,
By C. C. MANSFIELD, *Ass't P. M.*

4 And your orators further allege that the entry and admission of these publications as mailable matter of the second class was not made upon false evidence, and that since their first admission in March, 1886 until the filing of this bill there has been no change in their character except as to interval of issue as hereinbefore set forth.

5. That on April 4, 1902 the following notice was received by your orators:

OFFICE OF THE POSTMASTER,
BOSTON, MASS., *April* 4, 1902.

Messrs. Houghton, Mifflin & Co., pub. of "Riverside Literature Series," 4 Park St., Boston, Mass.

GENTLEMEN: You are respectfully informed that I am directed by the Third Assistant Postmaster General to inform you that opportunity is given you to show cause why your publication (the Riverside Literature Series) should not be denied second class rates of postage under the provisions of section 276, Postal Laws and Regulations, (a copy of which is enclosed), on the ground that your publication has the characteristics of books.

The department informs me that the hearing may take place at this office or at the department at Washington,—preferably at this office. All arguments, statements and evidence submitted by
5 you must be in writing, and this office is instructed that all arguments, evidence etc., must be submitted to the department by April 22.

If you desire to be heard at the department at Washington you will have to make an appointment with the Third Assistant Postmaster General.

Respectfully, GEO. A. HIBBARD, *Postmaster.*

(Copy enclosed.)

OFFICE OF THE POSTMASTER GENERAL,
WASHINGTON, D. C., *July* 17, 1901.

Order No. 898.

Section 276, Postal Laws and Regulations, edition of 1893, is hereby amended to read as follows:

SEC. 276. General definition.—Mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within the conditions named in section- 12 and 14. (Act of March 3, 1879, sec. 10, 20 Stats., 359) The sections referred to are 293 and 277. Second class matter above described is of two kinds: (1) That sent by publishers or news agents. (Section 299) (2) That sent by others than publishers or news agents. (Section 302). "Periodical publications" herein referred to are held not to include thos having the characteristics of books, but only such as consist of current news or miscellaneous literary matter, or both (not excluding advertising), and conform to the statutory characteristics of second class matter.

CH. EMORY SMITH,
Postmaster General.

6 6. That evidence and argument that these publications should not be denied second class rates on account of their having characteristics of books were submitted in compliance with said notice.

That on May 5th, 1902, the following notice was received.

OFFICE OF THE POSTMASTER,
BOSTON, MASS., *May* 5, 1902.

Houghton, Mifflin — Company, 4 Park St., Boston, Mass.

GENTLEMEN: In relation to your publication, the Riverside Literature Series, for which you were requested to submit evidence and arguments to show why it should not be denied second-class rates on account of its having characteristics of books, I have to inform you that your evidence was submitted to the Third Assistant Postmaster General as requested by his letter of April 2nd, and in answer thereto I have received notice to inform you that your certificate of entry giving you permission to mail the Riverside Literature Series at second-class rates is cancelled. You are further notified that hereafter it will be unlawful to print in the Riverside Literature Series a statement of entry, and that when it is offered for mailing in the future, whether by you, news agents or others, postage
7 will have to be prepaid thereon at the third-class rates by affixing stamps thereto.

Respectfully, GEO. A. HIBBARD, *Postmaster.*

P. S.—The reason for exclusion is, failure to establish that your publication comes within the provisions of the postal laws and regulations for acceptance in the mails as second-class matter.

That on May 8th, 1902, the foregoing order was suspended by order of the Postmaster General until further notice.

That on May 22nd, 1902, the following notice was received by your orators:—

OFFICE OF THE POSTMASTER,
BOSTON, MASS., *May* 22, 1902.

Houghton, Mifflin & Company, 4 Park street, Boston, Mass.

GENTLEMEN: In the relation to your request of May 21st asking for extension of time for the Riverside Literature Series, I have to inform you that under permission granted by the Third Assistant Postmaster General, that you will have until May 31st to mail your publication in, and the date of exclusion will be May 31st.

Respectfully,
(Signed) GEO. A. HIBBARD, *Postmaster.*

8 And your orators, on information and belief, declare:

That on May 31st, 1902, these publications will be excluded from the mails, in accordance with the foregoing orders of the Postmaster General.

7. That the cancellation of the certificate of entry giving permission to mail such publications at second class rates on account of their having the characteristics of books as declared by the respondent was unlawful.

That the exclusion of these publications from the mail as mailable matter of the second class, if put in force on May 31, 1902, as now threatened, will cause your orators great pecuniary loss and damage, both in the advanced rates demanded and in the necessary reorganization of its business in distributing these publications of which during the past year upwards of five hundred thousand copies were sent through the mails, all of which increase in rates and charges will have to be borne by your orators in those cases where existing contracts require it.

8. That your orators are liable, under existing contracts, to supply upwards of two million copies of these publications at a price based upon the postage rates chargeable upon them as mailable matter of the second class.

9. That the action of the Postmaster General in excluding these publications from the mails and denying to them the privilege of mailable matter of the second class, as hereinbefore set forth, is a reversal of and contrary to the practice sanctioned by him and his predecessors in office in regard to these particular publications extending over an unbroken period of sixteen years.

9 That the right to have these publications carried in the mails as mailable matter of the second class, and which has been accorded to your orators by the action of the Postmaster Generals, is a valuable property right exceeding in value the sum of five thousand dollars.

For as much as your orators are without a plain, adequate and complete remedy at law, and because if remediable at law relief could only be obtained by a multiplicity of suits, your orators pray:

First. That your orators may be declared to be entitled to have these publications entered, received and transmitted through the mails, as mailable matter of the second class, as defined by the act of Congress approved March 3, 1879.

Second. That it may please the court to grant an injunction restraining the respondent from enforcing the cancellation of the certificate of entry set forth in paragraph six of this bill, and requiring him to receive said publications and transmit the same through the mail as mailable matter of the second class, in accordance with the provisions of said act of Congress approved March 3, 1879.

Third. For such other and further relief as, under the facts stated, your orators may be entitled and in equity may seem meet.

Fourth. And your orators pray also for a preliminary injunction, and that your honors will grant a writ of subpœna directed to said respondent, requiring him to answer this bill, but not under
10 oath, an answer under oath being hereby expressly waived, and show cause why the prayers of this bill should not be granted.

GEORGE H. MIFFLIN,
HENRY O. HOUGHTON, *Trustee*,
J. MURRAY KAY,
LUCY H. VALENTINE,
OSCAR R. HOUGHTON,
ALBERT F. HOUGHTON,
By HOLMES CONRAD AND
LEIGH ROBINSON, *Their Sol'rs.*

UNITED STATES OF AMERICA, }
State of Massachusetts. }

BOSTON, *May* 27, 1902.

On this twenty seventh day of May, 1902, personally appeared George H. Mifflin who being by me duly sworn, deposes and says that he is one of the complainants within named; that he has read the foregoing bill of complaint subscribed by him, and knows the contents thereof, and that the same is true except as to the matters therein stated to be alleged on information and belief, and as to such matters he believes it to be true.

Sworn to and subscribed before me this twenty seventh day of May, 1902.

JOHN ABBOTT,
[SEAL.] *Notary Public.*

11 COMMONWEALTH OF MASSACHUSETTS, }
Office of the Secretary. }

BOSTON, *May* 27, 1902.

I hereby certify, that at the date of the attestation hereto annexed John Abbott was a notary public, for the said Commonwealth, duly commissioned and constituted, that as such notary public, he was

by law authorized to administer oaths and take acknowledgments of deeds and other instruments throughout the Commonwealth; that to his acts and attestations, as such, full faith and credit are and ought to be given in and out of court; and that I believe the signature to the annexed attestation to be genuine.

In testimony of which, I have hereunto affixed the seal of the Commonwealth the date first above written.

[SEAL.] WM. M. OLIN,
Secretary of the Commonwealth.

12 *Restraining Order.*

Upon the complainant filing undertaking as required by equity rule 42, the defendant will be hereby restrained as prayed in the within-mentioned bill, until further order, to be made, if at all, after a hearing, which is fixed for the 16th day of June at 10 o'clock a. m. 1902, of which take notice.

By the court:

A. B. HAGNER, *Justice.*

Attest:
J. R. YOUNG, *Clerk, etc.,*
By R. J. MEIGS, JR.,
Ass't Clerk, etc.

13 *Answer of Defendant.*

Filed October 15, 1902.

In the Supreme Court of the District of Columbia.

HENRY O. HOUGHTON, Trustee; GEORGE H. Mifflin, J. Murray Ray, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton, and Albert F. Houghton, Complainants,
vs.
HENRY C. PAYNE, Postmaster General, Defendant.
} Equity. No. 23342.

Answer of the defendant, The Postmaster General, to the bill of complaint of the above-named complainants.

The defendant, now and at all times hereafter saving and reserving to himself all and all manner of benefit or advantage of exception that may be taken to the said bill for the many errors, uncertainties and imperfections thereof, for answer thereto, or to so much thereof as he is advised that it is necessary or material for him to make answer unto, answering says:

I–II. The defendant is informed and believes that the allegations of the first two paragraphs of said bill are true.

III. For answer to the third paragraph, the defendant says that

the publications of the complainants designated as the "River-
14 side Literature Series" do not constitute a periodical publication within the intent and meaning of the statute of the United States defining the various classes of mailable matter. On the contrary, the defendant avers that although said publications are regularly issued at stated intervals from the known office of the complainants, and are formed of printed paper sheets, without board, cloth, leather or other substantial binding, and, as in said paragraph set forth, thus comply with the external characteristics and conditions of the second class of mail matter, nevertheless *internally and in substance*, they have not the characteristics of said second class of mail matter, but have the characteristics of books, and are in fact books, which by law are included in the third class of mail matter; and further, that said publications have not the characteristics of said second class of mail matter, in that they have no true relation or connection one with another so as to constitute them a periodical within the intent of the law, but each publication, issue, or so-called number, is in truth a separate reprint, unaltered and unabridged, of what previously has been published confessedly as a book or as a part of a book; and defendant further avers that the complainants have been in the practise, whenever the reprint was of greater volume than usual, of calling such a publication a double, triple, quadruple or quintuple number, as the magnitude of the publication might require, and of charging therefor twice, thrice, four or five times the usual price, as the case might be.

15 And the defendant further avers that the said several reprints follow one another quarterly, without order or system, in such manner as to form a wholly disconnected and varied succession of distinct pieces of reading matter in biography, poetry, essays, literary and descriptive, natural history and mythology; and that the only connection between the successive reprints consists in the mere fact that over the title of the publication or particular reprint are printed the words "Riverside Literature Series," and that the said reprints are numbered successively; and the defendant further avers that the complainants have been in the practice of printing, under the said style of the "Riverside Literature Series," so-called extra numbers designated not by numbers but by letters of the alphabet, which said extra numbers are of the same kind and nature and in all respects similar to the periodically published numbers or issues which are numbered successively; all of which will appear by an examination of the copies of such publications filed with the said bill and with this answer as a part hereof (marked Exhibits A, B, C, D, E and F), as well as by an inspection of the titles of the different numbers as the same are printed upon the cover of each of said copies.

And in further denial of the allegation that said several reprints published under the style of the "Riverside Literature Series" constitute a periodical publication within the meaning of the act of March 3, 1879, the defendant says that the said reprints are sold by

the complainants as separate publications, complete in themselves, and are designed, and used, as text-books for the study
16 of literature, and the same are likewise sold at a reduced rate for 10 or more copies of the same publication, and also at a further reduced rate of 100 or more copies of the same publication, and the same publication- bound in linen covers, without other or further change, are confessedly sold as books; all of which facts will more at large appear by reference to the printed announcement, catalogue or advertisement of said series issued by the complainants and annexed to this answer marked Exhibits G and H, and prayed to be read as a part hereof.

IV. The defendant is informed and believes that the allegations of the fourth paragraph are true.

V. The defendant admits the allegations of the fifth paragraph.

VI. The defendant admits the allegations of the sixth paragraph, with the exception of the allegation that in accordance with the orders therein mentioned the said publications will be excluded from the mails, and this he denies; he avers on the contrary the only effect of such orders will be to require the payment of postage at the third class rate instead of the second class rate, and he further says that it was his duty to examine into all the facts and circumstances which determine whether or not such publications do now in fact comply with the statutory conditions for acceptance at said second-class rate; and that, as a result of the inquiry into the facts and circumstances, upon the hearing aforesaid, this defendant, acting through the Third Assistant Postmaster General has found said publication not to be entitled to admission to the mails at the
17 second-class rate; and that it is his intention, in pursuance of such finding, unless restrained by this court, hereafter not to admit said publications to the mails at such second class rate.

VII. Answering the seventh paragraph as well as answering generally to the whole bill, the defendant says that, as Postmaster General of the United States, he is charged by law with the duty of superintending generally the business of the Post Office Department and of executing all laws relative to the postal service. That among his duties is that of classifying the mail matter offered for transmission through the United States mail and distributing the same into the respective classes created and designated by Congress; in course of which classification it becomes incumbent upon him to investigate and ascertain whether matter transmitted as second class matter does or does not comply with the conditions upon which the law permits publications to be admitted to the second-class rate, that such investigation, exercised by this defendant as the head of an executive department in the ordinary discharge of his duties, requires an inquiry into facts, an examination of evidence and an interpretation of law; and that in the case of the publication hereinbefore mentioned, after notice to the complainants, a full, fair and impartial hearing, and an inquiry into the facts relevant and material to the inquiry, an examination of evidence and a

construction of the law and application thereof to the facts, the
18 defendant found and determined that said publications now offered for transmission, not having the statutory characteristics of second-class matter but on the contrary the characteristics of third-class matter, and not fulfilling the conditions established by law for second-class matter, were not entitled to admission to the mails at the second-class rate, and that the certificate permitting such admission should for that reason, be revoked and become inoperative in the future; which said finding, determination and decision involved the exercise of judgment and discretion on the part of this defendant, and the Third Assistant Postmaster General acting in that behalf; and for that reason, as defendant respectfully submits, is not subject to be reviewed by this honorable court.

And this defendant further says that said certificate of entry was not cancelled, nor were the said publications refused admission to the second-class rate, by reason of any matter, thing, principle, rule or statement contained in the amendment to section 276 issued on July 17, 1901; but upon the sole ground that the said publication, by reason of the characteristics hereinbefore set out in the third paragraph of this answer, do not constitute a periodical publication within the intent and meaning of the act of March 3, 1879; but the said publication, and each and every of them, is a distinct and separate publication, complete in itself, not forming an integral part, issue or number of a regular periodical, but each and every of them is within the intent and meaning of the terms "books, transient
newspapers and periodicals" as the same are employed in
19 said act to define and designate mailable matter of the third class; miscellaneous printed matter.

VIII. The defendant can neither admit nor deny the allegations of the eighth paragraph, and submits that the same are wholly irrelevant and immaterial; but for anything the defendant knows to the contrary the same may be true as stated.

IX. In answer to the ninth paragraph, the defendant admits that his action in excluding the said publications from the privilege of the second class rate is contrary to the practice of his predecessors who for sixteen years admitted similar publications under the same general name to the privilege of that rate; but the defendant further says that the admission and transmission of mailable matter under the terms prescribed by the statutes is a continuous administrative act, the performance of which is devolved by law upon this defendant, and that the defendant in the performance of this duty is in no wise bound or controlled by the action of his predecessors, nor does the admission and transmission by one Postmaster General of mailable matter of a certain kind at the second or any other particular rate constitute any obligation, contractual or otherwise, upon the United States or its officers thereafter to admit similar publications under the same name at such particular rate.

Defendant is further advised, and so believing, avers, that the privilege of having publications, which comply with the conditions of second class matter as defined in the act of March 3, 1879, trans

mitted at the second class rate is not a property right; and
20 that whether publications do so comply with such conditions is a matter wholly within the competence and jurisdiction of the Postmaster General, and the determination of which is within the judgment and discretion of the Postmaster General for the time being.

And the defendant respectfully submits that complainants in and by their said bill and the matters and things set forth therein do not make or state such a case as would entitle them to the relief thereby prayed; and as to so much of the said bill as prays an injunction against the enforcement by this defendant of his decision that the said publications are not entitled to transmission at second-class rates, this defendant submits that it is against the course and practice and not within the jurisdiction of this court to interfere with, review or afford relief against the decision and action of the head of an executive department in a matter involving the exercise of his judgment and discretion; and defendant hopes he will have the same benefit of these defences as if he had formally demurred to the said bill upon the ground thereof. And having fully answered, the defendant prays to be hence dismissed with his reasonable costs.

EDWIN C. MADDEN,
Acting Postmaster General.

ASHLEY M. GOULD,
HENRY H. GLASSIE,
Solicitors for the Defendant.

21 DISTRICT OF COLUMBIA, ss:

Edwin C. Madden, acting Postmaster General, being first duly sworn, deposes and says that he has read the foregoing answer by him subscribed and knows the contents thereof, and the matters and things therein set forth he knows to be true save those stated upon information and belief, which he believes to be true.

EDWIN C. MADDEN,
Acting Postmaster General.

Subscribed and sworn to before me this 12th day of September, A. D. 1902.

THOS. E. ROACH,
Notary Public.

[SEAL.]

22 *Replication.*

Filed February 4, 1903.

In the Supreme Court of the District of Columbia.

HENRY O. HOUGHTON ET AL.
vs.
HENRY C. PAYNE, Postmaster General. } Equity. 23342.

The complainants hereby join issue upon the answer of the defendant and will hear the cause on bill and answer against the defendant.

HOLMES CONRAD,
Solicitor for the Complainants.

23 *Stipulation.*

Filed February 4, 1903.

In the Supreme Court of the District of Columbia.

HOUGHTON ET AL.
vs.
HENRY C. PAYNE, Postmaster General. } Eq. 23342.

It is hereby stipulated by and between the solicitors for the respective parties that reference may be made at any hearing of this cause to all or any of the issues of the complainant press published under the designation of the Riverside Literature Series:—and that the cause may be heard at this term.

HOLMES CONRAD,
Solicitor and Counsel for the Complainants.
MORGAN H. BEACH,
HENRY H. GLASSIE,
Solicitor- and Counsel for the Defendant.

24 *Decree.*

Filed March 10, 1903.

In the Supreme Court of the District of Columbia.

HENRY O. HOUGHTON and Others, Complainants,
vs.
HENRY C. PAYNE, Postmaster General. } In Equity. No. 23342.

This cause coming on to be heard upon the bill and the exhibits filed therewith and on the papers filed in the cause and the proceedings had therein, was argued by counsel. On consideration thereof it is this 10th day of March, 1903, adjudged, ordered and decreed,

1. That the complainants are entitled to have their publications entitled "Riverside Literature Series," received and transmitted through the mails, as mailable matter of the second class, as defined by the act of Congress approved March 3, 1879.

2. That the Postmaster General be, and he is hereby perpetually restrained from enforcing and continuing the cancellation of the certificate of entry set forth in paragraph six, of said bill, and from refusing to receive said publication and transmit the same through the mails, as mailable matter of the second class, in accordance with the provisions of said act of Congress approved March 3, 1879, and from denying to the complainants the receipt, entry and transmission through the mails of their publication, entitled "Riverside Literature Series," as mailable matter of the second class as defined by the act of Congress approved March 3, 1879.

25 3. That the complainants do recover of the defendant their costs incurred in this suit, and may have execution therefor according to law.

A. B. HAGNER,
Asso. Justice.

And the defendant in open court by direction of the Post Office Department and acting under that direction, prays an appeal to the Court of Appeals which is hereby allowed.

A. B. HAGNER.

26 *Opinion of the Court.*

Filed March 16, 1903.

In the Supreme Court of the District of Columbia.

HENRY O. HOUGHTON, Trustee, *et al.*
vs.
HENRY C. PAYNE, Postmaster-General. } Equity. No. 23342.

Justice HAGNER:

By the act of March 3, 1879, (20 Stats., 358) Congress revised the then existing classification of mailable matter, and affixed specific rates of postage to the respective classes thereby established; which were thus described:

"SEC. 7. Mailable matter shall be divided into four classes:
First. Written matter;
Second. Periodical publications;
Third. Miscellaneous printed matter;
Fourth. Merchandise."

Matter of the second class was thus described:

"SEC. 10. That mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year and are within the conditions named in sections twelve and fourteen."

SEC. 11. Publications of the second class (except as provided in section 25) shall be entitled to transmission through the mails at two cents a pound or fraction thereof."

27 "SEC. 12. That matter of the second class may be examined at the office of mailing, and if found to contain matter which is subject to a higher rate of postage, such matter shall be charged with postage at the rate to which the inclosed matter is subject:

Provided, That nothing herein contained shall be so construed as to prohibit the insertion in periodicals of advertisements attached permanently to the same."

"SEC. 12. That the conditions upon which a publication shall be admitted to the second class are as follows:

First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.

Second. It must be issued from a known office of publication.

Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.

Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers;

Provided, however, That nothing herein contained shall be so construed as to admit to the second class rate regular publications, designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

28 And by the act of March 3, 1885 (23 Stats. 385), it was provided that second class matter (except as to that excepted in section 25) shall, on and after June 1, 1885, be entitled to transmission through the mails at one cent a pound or fraction thereof.

Section 17, declared that mail matter of the third class shall embrace books, transient newspapers and periodicals, circulars, etc, and postage shall be paid at the rate of one cent for each two ounces or fractional part thereof.

The difference between these rates and those prescribed by the act of 1885 for second class postage is very great, and from that circumstance doubtless grew the difficulty which this suit was intended to settle.

Up to the year 1886 no postal regulations had been issued by the authorities restrictive of the construction which had been adopted and continuously followed by the Post Office Department as to the description of mailable matter entitled to be carried as "second class;" and although Congress in 1885 had reviewed and reduced the rate of that matter very greatly, it had abstained from all restriction of the character of matter that should enjoy the benefit of the reduced rate.

In this state of the law and the postal regulations, the complainants, book-sellers and publishers at Boston, commenced the issue of

publications which they called the "Riverside Literature Series." They applied for and received from the Boston post office from time to time the certificate in the form issued by the Postmaster
29 General then in office, declaring their publications entitled to admission into the mails as "second class matter;" and, in accordance with the instructions of the Government officials, a notice to that effect was printed on the outside of such publications. The last of these certificates bore date of the 15th of September, 1900.

On the 4th of April, 1902, nearly two years after this last certificate was issued, the complainants were notified by the postmaster at Boston to show cause why they should not be denied second class rates of postage, under sec. 276, Postal Laws and Regulations, dated the 17th of July, 1901, on the ground that their publication had the characteristics of books; and they were warned that on the 22nd of April all arguments, evidence, etc. bearing on the subject must be laid before the department. Evidence and arguments were accordingly submitted by the complainants to the Third Assistant Postmaster General, and on the 5th day of May, 1902, they were informed by the postmaster at Boston that their said certificate of entry was canceled, and that thereafter their publications should be prepaid as third-class matter. The reason given for the exclusion being "failure to establish that your publication comes within the provisions of the postal laws and regulations for acceptance as second class matter."

By a subsequent notification the complainants were informed that the time of exclusion of their publication was extended to the 31st of May, 1902. On this last day, the bill before the court was filed against the Postmaster General, which prayed the court to
30 declare: 1st. That the complainants are entitled to have their publications entered and transmitted through the mails as second class matter. 2nd. For an injunction to restrain the cancellation of the certificate of entry of September 15, 1900, by that official, and requiring him to receive and transmit their publications as mailable matter of the second class,—and for further relief.

The carefully prepared answer of the Postmaster General denies: First. That the Riverside Literature Series constitutes a periodical publication within the intent and meaning of the statute defining the classes of mailable matter; that, although complying *with the external characteristics and conditions of the second class of mail matter, nevertheless, internally and in substance they have not the characteristics of second class matter, but have the characteristics of books, and are in fact books;* and the answer proceeds at length to point out the various grounds of this discrimination.

He next insists that it is his official duty to arrange the mail matter into the classes created and designated by Congress; that, after notice to the complainants and a full and impartial hearing of evidence be found and determined, in the exercise of judgment and discretion, that the publications of the complainants were not entitled, under the conditions prescribed by law, to be admitted as

second class matter; and that such finding and determination are not subject to review by this court.

Admitting his action in excluding said publications from
31 the privileges of second class matter is contrary to the practice of his predecessors, who for sixteen years admitted similar publications to the privileges of that rate, the Postmaster General insists that the admission and transmission of mailable matter under the terms prescribed by the statute is a continuous administrative act, the performance of which is devolved by law upon this defendant, and that the defendant in the performance of this duty is in no way bound or controlled by the action of his predecessors.

And finally, that the admission of mail matter at a certain rate constitutes no contractual obligation upon the United States or its officers, and that the privilege of having publications admitted at any particular rate is not a property right; and whether they do comply with the conditions and requisites for admission is a question wholly within the competence of the Postmaster General, and within the judgment and discretion of that official for the time being.

1. The question of the jurisdiction of this court to determine the case is first to be considered.

That this court possesses the general jurisdiction to award an injunction or a mandamus against the highest officers of the Government in a proper case cannot be denied. When Chief Justice Marshall in 1802 in Marbury *v.* Madison, 1 Cranch, 171, said:

"It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined."

32 he was but stating what was afterwards uttered by the highest court of England, in Ellis *vs.* The Lords of the Treasury, 6 Simons, 214, where the vice chancellor issued an injunction, enjoining those officials from paying money to an official of the exchequer.

In 25 Maryland, Magruder *vs.* Swann, governor, the court of appeals ordered a mandamus against the governor.

In the argument in U. S. *vs.* Kendall, Postmaster General, Attorney General Butler admitted that the President himself was amendable to a mandamus to require the performance of a ministerial duty.

I have no idea that under our law, an order of the Postmaster General excluding a class of publications from certain privileges of the mail service because, according to his construction of a statute they are not entitled to those privileges, is to be regarded as the exercise of such official discretion as prevents the examination by this court of the question whether that official's construction of the law is the correct one.

The decisions of the most recent Postmaster General can be no more impeccable or free from criticism than those of his predecessors, for he can have no more official authority than his predecessors. Indeed, as between variant decisions on the same subject, by persons holding the same office in succession, there should be rather an inclination by the courts to sustain the earlier judgment, especially

where it has been followed for a considerable time by successive officials; as was suggested in Decatur *vs.* Spaulding, 12
33 Peters; Warder *vs.* Chandler, Secretary of the Navy, 2 Mackey, 527.

In U. S. *vs.* Alabama Railroad, 142 U. S. 621, it appeared the act of Congress of 1876, ch. 179, sec. 13, declared that where a railroad built by Government aid claimed compensation for carrying the mails, it should receive but 80 per cent. of the usual rates. In the same year 1876, in which this law was passed, it was decided by the Postmaster General then in office, that if part of a railroad had been constructed without any such Government aid, it had the right to demand the full rates over the portion thus built by private subscriptions; and payment according to this decision had been followed by six different Postmasters General from 1876 to 1885. In the latter year, the Postmaster General then in office, reviewing the act of 1876, reversed the construction given to it by his predecessors, and reduced the allowance over that part of the road which had not been constructed from the land grants. It appears in the decision that this construction was given not on account of any mistake of fact in the original orders under which payment had been made, but upon the ground of a supposed error of law in the interpretation of the section involved. The Supreme Court reversed this decision, and speaking by Mr. Justice Brown said:

"We think the contemporaneous construction thus given by the executive department of the Government, and continued for nine years, through six different administrations of that depart-
34 ment—a construction which though inconsistent with the literalism of the act, certainly consorts with the equities of the case—should be decisive in this suit. It is a settled doctrine of this court, that in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the Government upon the faith of such construction, may be prejudiced."

And the court overruled the decision of the last Postmaster General and reinstated that of his predecessor made nine years before.

Applying the suggestion made in this case to the case before us, it appears that between the passage of the act of March 3, 1879 and the cancelation of the last certificate in 1903, twenty-three years had intervened, during which eleven administrations of the Post Office Department had in turn been charged with the construction of the act; and during sixteen years of this period the complainants had been acting under the rule prescribed contemporaneously with the passage of the law; that Congress at twenty-three sessions had in turn examined the affairs of the postal service, at some of which sessions there had been made various changes connected with the matter in hand. During this time repeated suggestions had been made by different Postmasters General to amend the law so as to exclude

the class of mail matter here in controversy from the second
35 class rates; and this upon the earnest representations that the unwise liberality existing was responsible for the deficit in the post office revenues; and these recommendations had been examined by successive committees of both Houses, which had supported them in voluminous reports; with the result that Congress refused to make the changes so recommended; and so this contemporaneous construction remained undisturbed until the action taken in 1902, which is now under consideration.

There is no special power given to the Postmaster General to prescribe regulations at variance with an act of Congress. Section 161 of the Revised Statutes has been referred to as having some bearing upon the point, but this applies equally to all heads of departments. It is in these words:

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the costody, use and preservation of the records, papers and property appertaining to it."

But this section specially provides that such regulations are not to be *inconsistent with law;* and the matters which may be embraced in the regulations thus authorized to be made are very different in character from those under examination.

There are several provisions of the Revised Statutes committing particular powers to the Postmaster General which are of
36 such comparatively unimportant character as to indicate that special care had been observed to limit that officer even in affairs of minor importance. Thus, by sec. 3907 Congress took the pains to empower him to provide by regulation for carrying small newspapers issued less frequently than once a week; and under sec. 3909 to prescribe by regulation as to the form of affidavit to be taken by the publishers of a newspaper.

In comparison with the large powers now claimed of interpolating into the act of 1879 limitations and conditions not set forth in it, these minor grants of power appear very insignificant. It is strange it should have been thought important to provide specially for such trivialities, if the great powers claimed as to the matter in hand were already appurtenant to the office. Indeed, it may be asked why the entire subject of postage rates and arranging the classification should not have been left bodily to the Postmaster General, if the general power now claimed was clearly given by the law.

In the case of U. S. *vs.* Kendall, 3 Cranch, C. C. R., Mr. Kendall's claim as Postmaster General of power inherent in the office which justified him to construe an act of Congress so as to refuse to enter a credit on the books to Stockton & Stokes directed by law, received no support from the courts, and he was peremptorily ordered to comply with the provisions of the statute, his own opinion of the justice of the credit to the contrary. As Mr. Kendall's contention was based upon a supposed error of law in construing the statute in

favor of the claimant in that case, the court, upon the prin-
37 ciple declared in U. S. *vs.* Alabama Railroad, above cited, exercised the power of examining into the propriety of his decision.

Its right to do so has been recently declared in the case of The American School of Magnetic Healing *vs.* McAnnulty, to appear in 187 U. S. 94. In that case the Postmaster General decided that the Magnetic Company was within the meaning of sec. 3929 R. S., which authorized him, upon satisfactory evidence that any person was engaged in conducting any fraudulent lottery or any other scheme or device for obtaining money by false pretences, to instruct postmasters to return to the sender all registered letters directed to such person, with the word "Fraudulent" stamped on the outside, and otherwise to refuse to assist in the circulation of letters for such person. The Postmaster General issued such an order to McAnnulty, the postmaster at the town of Nevada, Missouri. The supreme court held that the fact that the decision of that official upon which his order was based was made only after summons and hearing (as has been allowed in the controversy at bar) did not affect the case.

In reply to the inquiry whether Congress has entrusted the administration of such statutes wholly to the discretion of the Postmaster General to such an extent that his determination is to be held conclusive upon all questions arising under them, the court said, that although the conduct of the post office is a part of the administrative department of the Government, "that does not neces-
sarily and always oust the courts of jurisdiction to grant re-
38 lief to a party aggrieved by any action by the head or one of the subordinate officials of the department, which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."

The court, after examining the entire case, held that upon the admissions of the demurrer the decision of the Postmaster General was not authorized by the statute, and his order "being the result of a mistaken view of the law, could not operate as a defense to this action on the part of the defendant. * * * In such a case as the one before us, there is no adequate remedy at law, the injunction to prohibit the further withholding of the mail from complainants being the only remedy at all adequate to the full relief to which the complainants are entitled. Although the Postmaster General had jurisdiction over the subject-matter (assuming the validity of the acts), and therefore it was his duty, upon complaint being made, to decide the question of law whether the case stated was within the statute, yet such decision, being a legal error, does not bind the courts."

The court concludes that "simply holding that the admitted facts show no violation of the statutes cited above, but an erroneous order given by the Postmaster General to defendant, which the courts have power to grant relief against, we are constrained to

* * * grant the temporary injunction as applied for by complainants."

In recognition of this decision the District Court of Appeals
39 very recently affirmed the decree of Justice Bradley in the case of Postmaster General *vs.* The National Railway Publication Company, which held an order of that official denying the privileges of second class postage rates to a publication called "The Official Guide of the Railways, etc.," generally known as the Travellers' Official Guide, was erroneous. The able opinion of the Court of Appeals in that case clearly shows that the department erred in holding the publication there referred to was not entitled to be rated as second class matter upon the case presented by the record; and I regard it as conclusive of this branch of the case.

II. It being clear that this court has the power to inquire into the validity of the decision of the Postmaster General the question remaining for consideration is whether, under a proper construction of the act of 1879, the Riverside Literature Series is entitled to the benefit of the second class rates.

The Postmaster General in his answer, as we have seen, admits that although the publications "comply with the *external characteristics and conditions of second class matter, nevertheless internally and in substance* they have not the characteristics of second class mail matter, *but have the characteristics of books, and are in fact books.*"

The requirements expressed in the law to entitle the admission of mail matter to the privileges of second class rates are nine in number, and under the discrimination of the answer must, with one exception, be designated as "*external.*" They require (1) there should be a *periodical* issue (2) *stated intervals*, (3) as frequently as
40 four times a year; (4) they must bear the date of the issue; (5) be numbered consecutively; (6) be issued from a known office of publication; (7) formed of printed paper sheets, (8) without board, cloth, leather, or other *substantial binding*, such as distinguish printed books for preservation from periodical publications, and (9) must have a legitimate list of subscribers. The only requirement expressed in the law which can be termed "internal" is that contained in provision fourth of section 14, which requires these publications "must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry."

It is, of course, beyond the power of the Postmaster General by direct order to add another to the list either of *external* or *internal* requirements. Congress, of course, might have done this, either originally when it passed the law or at any time after its passage, since it possesses full powers of legislation in that direction. But this it has steadily refused to do. By such legislation it might have doubled or multiplied in still larger ratio the postage rates on publications precisely like that before us; or still further reduced it. But no branch of this Government except the legislature possesses such powers; and yet that is precisely what the Postmaster General would effectually accomplish by the new regulation of 1901, with

respect both to the external and to the internal requirements, if it were sustained. For example, the third division of section 14 is the only paragraph which refers to "books" in connection
41 with the requirements of second class matter, and all it there enjoins is that the periodicals of that class must not have *substantial bindings* "such as distinguish printed *books for preservation* from periodical publications." The bindings of the publications therein described are not those of *all* books, but only of such books as are "*bound for preservation.*"

But the Postmaster General's order of July, 1901, excludes all publications "having the *characteristics of books*," without regard to whether they are books "*bound for preservation*" (which implies reasonable strong binding); or only for temporary use, in the flimsiest or most perishable manner; or not bound at all. There are other "characteristics of books" besides their bindings, and the monthly magazines, such as the Century and Scribners', admittedly second class matter, possess many "*characteristics*" of ordinary books, besides those of opera books, note books, bank books, etc., etc., which are never or very seldom bound. Thus the order makes this *external* requirement more rigid and narrow than the statute had done.

The original "*internal*" provision, embraced in the fourth division of section 14, as passed by Congress, contained no requirement that the periodical publications to be entitled to second class rates shall *only* include such as "*consist of current news or miscellaneous literary matter, or both.*" But the Postmaster General's order *superadds* this qualification to those which Congress had theretofore determined to be sufficient, and had so declared in the statute passed nearly a quarter of a century ago.

42 Of course, this provision must have been designed to *add new conditions* to the existing enumeration; otherwise, it is without meaning at all (which we cannot assume), and should not have been introduced to perplex and give needless trouble. Religious magazines, or publications specially for architects, physicians, lawyers, electricians, mathematicians, chess-players, dressmakers, etc., etc., must add "current news or miscellaneous literary matter," to their contents under peril of exclusion from the second class rates. The case of the Railroad Guide, decided by the Court of Appeals, is an unanswerable illustration of this point.

These changes I think the Postmaster General was without power to make, and his order, in these respects, as to the case before me, was the consequence of an inaccurate construction of the statute, and should, therefore, be declared illegal and void.

Much stress was laid in the able argument on behalf of the Postmaster General, upon the fact that one of the publications filed as an exhibit was the republication of one of Thackeray's novels. I should have supposed, before reading the entire statute, that the republication of old novels or books would not have been within the contemplation of the law-givers as favored publications, since there seemed to be nothing in such admission of reprints to favor native living authors. But I find nothing in the law to indicate

that such a purpose was in the mind of the legislators; for in the enumeration of third-class matter, paying eight times as much as second class mail, are included "proof sheets, corrected proof sheets,
and manuscript accompanying the same," which would seem
43 more like a discrimination against our living authors than an encouragement; and by section 15 "foreign newspapers and other *periodicals* of the same general character as *those* admitted to the second class in the United States may, under the direction of the Postmaster General, on application of the publishers thereof or their agents, be transmitted through the mails at the same rates as if published in the United States."

But the insertion in newspapers and magazines of chapters of completed books, and the insertion in serial form of English and American writings is no novelty. Most of the famous novels of Dickens, Reads, etc., were published in our magazines and newspapers contemporaneously with their publication in England. The European newspapers and magazines, admitted to second class rates, as we have seen, especially those published in France, generally contain parts of books. One at least of the best known magazines here (Lippincott's) publishes in each number a completed work; and no objection could be made to its second class privileges for that reason.

I have examined this case with care, and can see no reason why the preliminary injunction already granted should not be made perpetual, and I shall so order.

A. B. HAGNER,
Asso. Justice.

44 *Stipulation.*

Filed March 20, 1903.

In the Supreme Court of the District of Columbia.

HOUGHTON ET AL.
vs.
PAYNE, Postmaster-General. } Eq. No. 23342.

It is stipulated by and between counsel for the respective parties that the original exhibits filed on behalf of the complainants and the defendant may be certified with the transcript of the record in lieu of copies thereof; and that such exhibits in the Court of Appeals may be used at the hearing of the cause and examined by the court and the printing thereof dispensed with.

HOLMES CONRAD,
Solicitor for the Complainant.
MORGAN H. BEACH,
HENRY H. GLASSIE,
Solicitors for the Defendants.

45 *Directions for Record.*

Filed March 20, 1903.

In the Supreme Court of the District of Columbia.

HOUGHTON ET AL.
vs.
PAYNE, Postmaster-General. } Eq. No. 23342.

The clerk of the court in making up the record on appeal in this cause will include: (1) bill of complaint and rule to show cause; (2) answer of the defendants; (3) replication; (4) stipulation of counsel; (5) opinion of the court; (6) final decree; (7) stipulation as to printing of exhibits.

MORGAN H. BEACH,
HENRY H. GLASSIE,
Solicitors for the Defendant.

I consent.
HOLMES CONRAD,
Sol. for Compl't.

46 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 45, inclusive, and the exhibits, marked "Exhibit A," "Exhibit B," "Exhibit C," "Exhibit D," "Exhibit E," "Exhibit F," "Exhibit G" "R. L. S. Exhibit," and "R. L. S. Exhibit," transmitted herewith, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 23342, in equity, wherein Henry O. Houghton, trustee, *et al.* are complainants, and Henry C. Payne, Postmaster General, is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 10 day of April, A. D. 1903.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1303. Henry C. Payne, Postmaster General, appellant, *vs.* Henry O. Houghton, trustee, *et al.* Court of Appeals, District of Columbia. Filed Apr. 14, 1903. Robert Willett, clerk.

TUESDAY, *May* 19*th*, *A. D.* 1903.

HENRY C. PAYNE, Postmaster General, Appellant,
vs.
HENRY O. HOUGHTON, Trustee; GEORGE H. MIFFLIN, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton, and Albert F. Houghton, } No. 1303.

and

HENRY C. PAYNE, Postmaster General, Appellant,
vs.
BATES AND GUILD COMPANY. } No. 1309.

The argument in the above entitled causes was commenced by Mr. H. H. Glassie attorney for the appellant, and was continued by Messrs. Wm. S. Hall and Holmes Conrad attorneys for the appellees, and was concluded by Mr. John G. Johnson attorney for the appellant.

HENRY C. PAYNE, Postmaster General, Appellant,
vs.
HENRY O. HOUGHTON, Trustee; GEORGE H. MIFFLIN, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton, and Albert F. Houghton. } No. 1303.

(Mr. Justice Shepard delivered the opinion of the court.)

This is an appeal from a decree of the supreme court of the District, declaring that the complainants, under the partnership name of Houghton, Mifflin and Company, are entitled to have their publications, entitled Riverside Literature Series, received and transmitted through the mails as matter of the second class; and perpetually restraining the defendant, The Postmaster General, from enforcing and continuing the cancellation of the certificate of entry formerly issued to complainants, and from refusing to receive and transmit the said publication through the mails, as mailable matter of the second class.

The cause was submitted upon bill, answer and exhibits, and the final decree from which this appeal has been prosecuted, was entered March 10, 1903.

The bill alleges: That complainants, under the partnership name of Houghton, Mifflin and Company, were, on March 17, 1886, and have ever since been engaged in the business of printers and publishers of books and periodicals of the Riverside Press in Cambridge Massachusetts, having their office of publication at four, Park row, Boston, which said office was and is well known. That since said date they have been publishing a series of periodical publications known and described as "Riverside Literature Series," each of which

have been regularly issued at stated intervals, as frequently as four times a year, have borne date of issue, have been numbered consecutively, and have been issued from the known office of publication aforesaid. That each and every one of these publications have been formed of printed paper sheets, without boards, cloth, leather, or other substantial binding such as distinguish printed books for preservation from periodical publications. That each and every one have been devoted to literature, have had a legitimate list of subscribers, and have not been designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates, and in respect of publication and issue have complied with all the requirements of the laws relating to mailable matter of the second class.

That of these publications already issued, Nos. 1–18 were issued weekly to July 1886; Nos. 19–42, monthly to April 1889; Nos. 43–62, quarterly to April 1894; Nos. 63–116, semi-monthly to May 1897; Nos. 117–143 monthly to May 1900; Nos. 144–151, quarterly to April 1902. That from March 17, 1886, to the date of filing this bill, these publications have been recognized, entered and admitted by the successive Postmaster Generals of the United States as mailable matter of the second class, and have been conveyed at the rates for such matter prescribed under certificates to that effect, the last of which bears date September 15, 1900. (The certificate is attached, and is of the regular form of certificate adopted by the Post Office Department for second class mail privileges, concluding with these words—"Valid while the character of the publication remains unchanged, or until revoked.") That on April 4, 1902, complainants were served with notice to show cause why their publications aforesaid should not be denied second class rates of postage, on the ground that they have the characteristics of books, upon a hearing set for April 22.

That evidence and argument were submitted at the hearing given on the date aforesaid on behalf of the continuation of the said mailing privilege. That on May 5, complainants were served with notice in writing to the effect that the certificate of admission before mentioned had been cancelled, and that thereafter it would be unlawful to print the usual statement of entry as second class matter, and further that their publications when offered for mailing thereafter would have to be prepaid at third class rates. That subsequently the order of cancellation and denial of second class privilege was stayed until May 31. That this cancellation and refusal are unlawful, and the exclusion of the aforesaid publications will cause complainants great pecuniary loss and damage both in the advanced rates demanded, and in the necessary re-organization of their business for the distribution of the same, which during the past year amounted to about five hundred thousand copies.

That complainants are liable, under existing contracts, to supply upwards of two million copies of these publications at a price based upon the postage rates chargeable upon them as matter of the second class. That the action of the Postmaster General in exclud-

ing their publications is a reversal of an unbroken practice of sixteen years, and is the destruction of a property right exceeding five thousand dollars in value. And that complainants are without adequate remedy at law, because if any remedy could be afforded at law, it would necessitate a multiplicity of suits.

The answer of the Postmaster General, reserving exceptions to the authority of the court to review the exercise of discretion by him in the matter of investigating and determining the character of the complainants' publications and the rates of postage chargeable thereon, admits the formal allegations of the bill, but denies that the said Riverside Literature Series is a periodical publication within the meaning of the law, and avers that the several numbers of the same have all the characteristics of, and are books, and as such are not mailable at second class rates. The answer then proceeds to describe the character of the publication as follows:

"That said publications have not the characteristics of said second class of mail matter, in that they have no true relation or connection one with another so as to constitute them a periodical within the intent of the law, but each publication, issue, or so-called number, is in truth a separate reprint, unaltered and unabridged, of what previously has been published confessedly as a book or as a part of a book; and defendant further avers that the complainants have been in the practice, whenever the reprint was of greater volume than usual, of calling such a publication a double, triple, quadruple or quintuple number, as the magnitude of the publication might require, and of charging therefor twice, thrice, four or five times the usual price, as the case might be.

And the defendant further avers that the said several reprints follow one another quarterly, without order or system, in such manner as to form a wholly disconnected and varied succession of distinct pieces of reading matter in biography, poetry, essays, literary and descriptive, natural history and mythology; and that the only connection between the successive reprints consists in the mere fact that over the title of the publication or particular reprint are printed the words "Riverside Literature Series," and that the said reprints are numbered successively; and the defendant further avers that the complainants have been in the practice of printing, under the said style of the "Riverside Literature Series," so-called extra numbers designated not by numbers but by letters of the alphabet, which said extra numbers are of the same kind and nature and in all respects similar to the periodically published numbers or issues which are numbered successively; all of which will appear by an examination of the copies of such publications filed with the said bill and with this answer as a part hereof (marked Exhibits A, B, C, D, E and F), as well as by an inspection of the titles of the different numbers as the same are printed upon the cover of each of said copies.

And in further denial of the allegation that said several reprints published under the style of the "Riverside Literature Series" constitute a periodical publication within the meaning of the act of March 3, 1879, the defendant says that the said reprints are sold by the

complainants as separate publications, complete in themselves, and are designed, and used, as text-books for the study of literature, and the same are likewise sold at a reduced rate for 10 or more copies of the same publication, and also at a further reduced rate of 100 or more copies of the same publication, and the same publication—bound in linen covers, without other or further change, are confessedly sold as books; all of which facts will more at large appear by reference to the printed announcement, catalogue or advertisement of said series issued by the complainants and annexed to this answer marked Exhibits G and H, and prayed to be read as a part hereof."

The answer further avers that the revocation of the certificate of admission to the mail was based, not upon any regulation of the department, but on the sole ground that the publication aforesaid was not admissible to the mails as matter of the second class, because it was not such as defined in the statute making classification of mail matter.

Among the exhibits are the following numbers of the Riverside Literature Series: 1. A complete republication of Henry Esmond with thick paper cover and linen back. Above the title with name of author and publishers appear the words Riverside Literature Series in large letters. Near the top of the cover appear the following: Issued monthly September to June. Number 140. (Quintuple number.) February 7, 1900. Near the bottom appear list of prices: Single numbers, fifteen cents: Double numbers thirty cents. Triple numbers forty five cents. Quadruple numbers fifty cents. Quintuple numbers sixty cents. 2. Three Outdoor Papers, by T. W. Higginson No. 141. 3. Sesame and Lilies by John Ruskin, No. 142. 4. Plutarch's Alexander the Great—done into English by Sir Thomas North—No. 143. 5. The Book of Legends, by Horace E. Scudder No. 144. All of these save in title, date and number bear the same imprint as Henry Esmond. Other exhibits consist of catalogues of the publishing company, giving titles, prices &c. Prefatory notes in these announce the purpose of the publishers "to issue in inexpensive form for school use the most interesting and instructive master pieces of the greatest writers of England and America," and also inform the public that while each number has been issued in paper covers, many single numbers, and many combinations of numbers have been bound in linin covers in response to a demand for a larger amount of material in a single volume with a more permanent binding. The price list gives the cost of the paper numbers, and also the bound volumes. Bound volumes sent at purchasers' cost; paper backs are post paid. Many other publications of this series, and by other publishers were by consent of parties exhibited on the hearing.

The sections of the postal laws which have bearing, direct or indirect, upon the subject matter of the controversy are the following:

"SEC. 7. Mailable matter shall be divided into four classes:

First. Written matter;

Second. Periodical publications;

Third. Miscellaneous printed matter;
Fourth. Merchandise."

"SEC. 10. That mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year and are within the conditions named in sections twelve and fourteen."

"SEC. 12. That matter of the second class may be examined at the office of mailing, and if found to contain matter which is subject to a higher rate of postage, such matter shall be charged with postage at the rate to which the inclosed matter is subject:

Provided, That nothing herein contained shall be so construed as to prohibit the insertion in periodicals of advertisements attached permanently to the same."

"SEC. 14. That the conditions upon which a publication shall be admitted to the second class are as follows:

First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.

Second. It must be issued from a known office of publication.

Third. It must be formed of printed sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.

Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers;

Provided, however, That nothing herein contained shall be so construed as to admit to the second class rate regular publications, designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

SEC. 15. That foreign newspapers and other periodicals of the same general character as those admitted to the second class in the United States may, under the direction of the Postmaster General, on application of the publishers thereof or their agents, be transmitted through the mails at the same rates as if published in the United States. * * *

SEC. 17. That mail matter of the third class shall embrace books, transient newspapers, and periodicals, circulars, and other matter wholly in print (not included in section twelve), proof sheets, corrected proof sheets, and manuscript copy accompanying the same, and postage shall be paid at the rate of one cent for each two ounces or fractional part thereof, and shall fully be prepaid by postage stamps affixed to said matter.

Printed matter other than books received in the mails from foreign countries under the provisions of postal treaties or conventions shall be free of customs duty, and books which are admitted to the international mails exchanged under the provisions of the Universal Postal Union convention may, when subject to customs duty, be delivered to addresses in the United States under such regulations for

the collection of duties as may be agreed upon by the Secretary of the Treasury and the Postmaster-General.

Section 20, puts in the fourth class all matter not embraced in the first, second and third classes, with certain limitations upon its character, weight &c.

SEC. 25. That publications of the second class, one copy to each actual subscriber residing in the county where the same are printed, in whole or in part, and published, shall go free through the mails; but the same shall not be delivered at letter-carrier offices, or distributed by carriers, unless postage is paid thereon at the rate prescribed in section thirteen (6) of this act;

Provided, That the rate of postage on newspapers, excepting weeklies, and periodicals not exceeding two ounces in weight, when the same are deposited in a letter-carrier office for delivery by its carriers, shall be uniform at one cent each.

1. The case at bar is distinguishable from that of Payne *v.* Nat. R'y Pub. Co. (20 App. D. C. 581), inasmuch as there is not only some difference in the facts relating to the respective publications, but also, and particularly, for the reason that the action of the Postmaster General in that case was based upon a regulation of his department, in excess of his authority because it made a substantial addition to the requirements of the statute.

Upon the practical admission, as apprehended by the court in that case, that the plaintiff had complied with the requirements of the statute itself, and had been denied the admission of its publication to the mails as matter of the second class, by virtue of the unauthorized regulation, it was held that the Postmaster General owed it the performance of a simple duty, plainly imposed by the act of Congress, that was enforceable through the writ of mandamus.

The same question touching the judicial power to supervise the determination of the head of the Post Office Department respecting the admission of publications to carriage in the mails at second class rates, has been raised and argued in the case at bar in application to the facts disclosed by the record.

And the general question of the extent, and limitations of this power is not affected by differences in the form of relief sought—whether mandamus in one case, or injunction in another. The difference of the operation of the two remedies in a particular case, as illustrated in Payne *v.* Bates and Guild Co.—*post*—would seem, however, to suggest, the exercise of greater circumspection where the remedy sought is injunction, which may have a continuing, mandatory operation.

With these suggestions we will pass the question and consider the case upon its merits, which have been fully and ably argued upon both sides, believing that, on account of litigation both pending and imminent, the public and private interests will be better served by so doing.

2. It appears that the publications of the Riverside Literature Series comply with the conditions of section 14 of the statute, in that

they are regularly issued from a known office of publication, at stated intervals, as frequently as four times a year, bear a date of issue, are numbered consecutively, and are formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications. For the present purpose, it may be assumed that they are all originated for the dissemination of information of a useful character, or devoted to literature, and have a legitimate list of subscribers. The question then arises: Are these publications—Henry Esmond, Plutarch's Life of Alexander, and others—books, and therefore mailable matter of the third class as defined in section 17; or, as a result of their issue in consecutive numbers and parts of the Riverside Literature Series, do they constitute a periodical publication, and become mailable matter of the second class, as defined in sections 10 and 14?

We think that there is but one reasonable answer to this question, and that has been given by the Postmaster General.

Henry Esmond, when given to the world by the genius of Thackeray in 1852, and whether issued by the publisher in paper covers, or with board, cloth, leather, or other substantial binding, was a book in every sense of the word. Republished singly at any time since the enactment of the present postal law, and mailed, either bound or unbound, it has been, and is now, unquestionably, subject to postage as matter of the third class.

Does it become any the less a book when, there being no protecting copy-right, it may be republished *verbatim* under its original title, with the addition of a number of a named series consisting of books by other authors, numbered consecutively and issued at stated periods not less than four times a year?

Can the well known book lose its identity and become completely merged in a periodical publication through the adoption and imprint of these additions?

Surely Congress could have contemplated no such possibility when it undertook the complete classification of mail matter, putting books in one class and periodical publications in another.

It is a matter of common knowledge that when these statutes were enacted there were in existence many long established periodical publications, known generally as magazines and reviews, that had been regularly issued in consecutive numbers, at stated periods not less than four times a year, from well known offices of publication. These, whilst purchased and sold by book and news dealers, were, in great part, sent through the mails to individual subscribers throughout the country.

Conceiving that such of these as disseminated information of a public character, or were devoted to literature, the sciences, arts, or some special industry, and had legitimate lists of subscribers, were of educational value, and promotive of the public good, Congress undertook to encourage their circulation along with the ordinary newspapers of more frequent issue, by admitting them to carriage in the mails at an exceptionally low rate. Each of these had a sin-

gle, general name; consecutive numbers, alike in size, print, &c., were but parts of one continuous publication, having no sub-title, or other specific designation to distinguish them from each other. A publication of the kind is commonly called a periodical, and answers the definition of that word as given in the Century dictionary: "A publication issued at regular intervals in successive numbers or parts, each of which (properly) contains matter on a variety of topics, and no one of which is contemplated as forming a book of itself."

In view of the general character of the periodical publications of the time, and the collocation of descriptive words in section 10,—"all newspapers and other periodical publications"—we think it reasonable to believe that the framers of the law regarded periodical publications, and periodicals as synonymous.

This inference seems reduced to certainty by the language of succeeding sections of the same statute. In section 15 we find that "foreign newspapers and other periodicals of the same general character as those admitted to the second class in the United States," shall be transmitted at the same rates as if published therein.

If, then, the contention on behalf of the appellees be correct, an English publisher might republish all of Thackeray's novels under the adopted title of some literature series, in consecutive numbers issued at least four times a year, and not only transmit them to subscribers through the mails of the United States, as second class mail matter, but also, it seems, secure their entry free of customs duty by the concluding provision of section 17. Again, whilst by section 10 the regular newspaper and periodical publications are made matter of the second class. Section 17 embraces "transient newspapers and periodicals" in the third class. Finally, in section 25 which gives free carriage within the home county to publications of the second class, the proviso relating to postage when delivery shall be made by carrier, uses the word, periodicals, alone.

The periodicals, or periodical publica ions above mentioned, may well be described as "originated and published for the dissemination of useful information, or devoted to literature, the sciences, arts, or some special industry." On the other hand, the several numbers of the Riverside Literature Series that have been named—each a complete independent work—are, as described in the publisher's catalogue, "master pieces of the greatest writers of England and America." They constitute literature, and are not acurately defined as "devoted to literature."

It is to be observed also, that the provisions of section 14 are not descriptive of the periodical publications named in section 10, but express limitations upon the admission of such publications to carriage as second class matter, under the head of conditions to which they must conform before the privilege can be enjoyed. One does not look to them to determine what is a periodical publication, but to ascertain whether, being such a publication as is embraced by section 10, it also answers the conditions imposed. Viewed in this light there is no substantial weight in the argument based on the

concluding words of the third condition that relates to binding, namely, "such as distinguished printed books for preservation from periodical publications." These words are to some extent confusing, but it would do violence to approved rules of construction to give them the effect of controlling the meaning of periodical publications, when the same shall have complied with other formal conditions. The words are apparently superfluous, and if used with any purpose it would rather seem to be to emphasize the limitation to unbound periodicals.

Another feature that distinguishes the Riverside Literature Series from the ordinary periodical is, that it has no "back numbers" that may become practically valueless, and dead matter, so to speak, in so far as the mailing privilege is concerned. No. 1, first issued in 1886, is as much alive as, and possibly more than the latest number of 1902, or 1903. It is Longfellow's Evangeline, and the catalogue of 1902, announces "a new and enlarged edition with introduction, notes and illustrations—the only authorized school edition"—and offers it in paper covers or bound in cloth.

After sixteen years, it continues to be mailed as matter of the second class to subscribers, when in paper covers bearing the number, and as matter of the third class to purchasers, when more substantially bound. Any inquiry into what may be meant by the condition requiring a legitimate list of subscribers, is precluded by the allegation of the bill to that effect which has not been denied.

Whether such requirement is answered by lists of dealers, who order from time to time exclusively for sale, and that embrace none of the single subscribers common with the ordinary periodicals, is, however, a question which the Postmaster General may be called upon to decide when admissions to the mail are demanded.

3. The fact that appellees may have made large contracts for the future delivery of their publications, at prices founded on confidence in the continuation of the certificate of admission to the mails at second class rates, that was issued under a former administration of the Post Office Department, does not entitle them to the injunction granted, under what we regard as an incorrect interpretation of the law. The courts ought to, and do give great weight to the long continued practice of an excutive department, founded on the interpretation of a statute conferring powers and duties of administration; but never a controlling weight save in cases of doubtful construction. In view of the importance of general stability, the succeeding heads of a department may well give greater weight than the courts to the decisions of their predecessors; but they have the right to reverse a practice, even long continued, when clearly convinced that it is founded on an incorrect interpretation of the law. Save in respect of a subject matter finally closed and settled under the former practice, the decision on which that practice is founded, contains no element of estoppel or *res judicata* as the doctrines thereof are applicable in judicial proceedings. Were an attempt made now to reopen the question as to mail matter

carried under the former permission, and collect additional postage, the question would be a very different one.

In conclusion it may be remarked that the certificate relied on is a mere license, and by its own express declaration continues until revoked.

In accordance with these conclusions, we must reverse the decree appealed from, with costs, and remand the cause to the court below with direction to dismiss the bill. It is so ordered.

Reversed.

FRIDAY, *June 5th, A. D.* 1903.

HENRY C. PAYNE, Postmaster General, Appellant,
vs.
HENRY O. HOUGHTON, Trustee; GEORGE H. MIFFLIN, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton, and Albert F. Houghton.
No. 1303, April Term, 1903.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said supreme court in this cause be and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the said supreme court with direction to dismiss the bill.

Per MR. JUSTICE SHEPARD.

June 5, 1903.

Court of Appeals of the District of Columbia.

HENRY C. PAYNE, Postmaster General, Appellant,
vs.
HENRY O. HOUGHTON, Trustee; GEORGE H. Mifflin, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton, and Albert F. Houghton, Appellees.
No. 1303, April Term, 1903.

Now come Henry O. Houghton, trustee, George H. Mifflin, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton and Albert F. Houghton, the appellees in the above entitled cause, and move and pray an appeal to the Supreme Court of the United States from the decree of this court in said cause rendered on the 5th day of June, A. D. 1903, and that said appeal be allowed and that the amount of bond be fixed to act as a supersedeas, and as a continuance of the injunction pending said appeal.

HOLMES CONRAD,
Solicitor for said Appellees.

Appeal allowed to the Supreme Court of the United States, as moved for and prayed, and amount of bond to act as a supersedeas, and a continuance of the injunction pending said appeal, fixed at the sum of four thousand dollars.

By the court:

M. F. MORRIS,
SETH SHEPARD,
Associate Justices.

(Endorsed:) No. 1303. Henry C. Payne, Postmaster General, appellant, *vs.* Henry O. Houghton, trustee, George H. Mifflin, J. Murray Kay, *et al.* Motion for appeal to Supreme Court U. S., order allowing same and fixing amount of bond to act as a supersedeas at $4,000. Court of Appeals, District of Columbia. Filed Jun- 15, 1903. Robert Willett, clerk.

(*Bond on Appeal.*)

Know all men by these presents, that we, Henry O. Houghton, trustee, George H. Mifflin, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton and Albert F. Houghton, as principals, and American Surety Company of New York, a corporation organized under the laws of the State of New York, having an office and usual place of business in Boston, Mass., as surety, are held and firmly bound unto Henry C. Payne, Postmaster General in the full and just sum of ($4,000) four thousand dollars, to be paid to the said Henry C. Payne, Postmaster General, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, successors, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-second day of June, in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said court, between Henry C. Payne, Postmaster General, and Henry O. Houghton, trustee, George H. Mifflin, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton and Albert F. Houghton, No. 1303 April term, 1903, a decree was rendered against the said Henry O. Houghton, trustee, George H. Mifflin, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton and Albert F. Houghton, and the said Henry O. Houghton, trustee, George H. Mifflin, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton and Albert F. Houghton having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Henry C. Payne, Postmaster General, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, that if the said Henry O. Houghton, trustee, George H. Mifflin, J. Murray Kay,

Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton, and Albert F. Houghton shall prosecute said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

NELLIE E. SWAIN, as to
HENRY O. HOUGHTON, *Trustee.* [SEAL.]
HENRY O. HOUGHTON. [SEAL.]
GEORGE H. MIFFLIN. [SEAL.]
JAS. MURRAY KAY. [SEAL.]
LUCY H. VALENTINE, [SEAL.]
Per G. H. M., *Att'y.*
O. R. HOUGHTON, [SEAL.]
A. F. HOUGHTON,
By G. H. M., *Att'y.* [SEAL.]

Sealed and delivered in presence of—
ALICE A. PEAR, as to { G. H. M. O. R. H. / J. M. K. / L. H. V. A. F. H.

AMERICAN SURETY COMPANY OF NEW YORK,
By WALLACE H. HAM,
Resident Vice President.

Attest:
[Seal of American Surety Company of New York.]
ELIPHALET F. PHILBRICK,
Resident Ass't Secretary.

Approved by—
M. F. MORRIS,
Associate Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 1309. Henry O. Houghton, trustee, *et al.*, appellants *vs.* Henry C. Payne, Postmaster General. Bond on appeal to Supreme Court U. S. Court of Appeals District of Columbia. Filed June 25, 1903 Robert Willett clerk.

UNITED STATES OF AMERICA, *ss:*

To Henry C. Payne, Postmaster General, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Henry O. Houghton, trustee, George H. Mifflin, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton, and Albert F. Houghton are appellants and you are appellee, to show cause, if any there be, why the decree rendered

against the appellants should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable M. F. Morris, associate justice of the Court of Appeals of the District of Columbia, this 25th day of June, in the year of our Lord one thousand nine hundred and three.

M. F. MORRIS,
Associate Justice of the Court of Appeals of the District of Columbia.

Service accepted this 25th day of June 1903.

HENRY H. GLASSIE,
Special Assistant to the Attorney General, Attorney for the Appellee.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun-25 1903 Robert Willett clerk

Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 42 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Henry C. Payne, Postmaster General, appellant, *vs.* Henry O. Houghton, trustee; George H. Mifflin, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton and Albert F. Houghton, No. 1303, April term, 1903, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 2d day of July A. D. 1903.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 19023. District of Columbia Court of Appeals. Term No. 372. Henry O. Houghton, trustee; George H. Mifflin, J. Murray Kay, *et al.*, appellants, *vs.* Henry C. Payne, Postmaster General. Filed July 28th, 1903.

TRANSCRIPT OF RECORD

(19,024)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 373.

BATES AND GUILD COMPANY, APPELLANT,

vs.

HENRY C. PAYNE, POSTMASTER GENERAL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia

HENRY C. PAYNE, Postmaster General, Appellant,
vs.
BATES & GUILD COMPANY.
No. 1309.

a Supreme Court of the District of Columbia.

BATES & GUILD COMPANY, Petitioner,
vs.
HENRY C. PAYNE, Postmaster General, Respondent.
No. 23722. In Equity.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Bill.*

Filed Jan. 27, 1903.

Supreme Court of the District of Columbia.

BATES & GUILD COMPANY
vs.
HENRY C. PAYNE, Postmaster General.
In Equity. No. 23722.

To the honorable the supreme court of the District of Columbia, sitting in equity:

The Bates & Guild Company, a corporation duly established under the laws of the State of Maine and having a usual place of business in the city of Boston in the State of Massachusetts, brings this its bill of complaint against Henry C. Payne, Postmaster General of the United States.

And your orator complaining says:—

1. That your orator is a citizen of the United States;

That the respondent is a citizen of the United States holding the office of Postmaster General of the United States.

2. That prior to January, 1903, and at the time of filing this bill your orator was and is engaged in the business of a publisher of

books and periodicals in said Boston, having its office of publication at 42 Chauncy street in said Boston, and that said office of publication was and is well known.

3. That as such publisher it has been and is engaged in publishing a series of periodical publications known and described as "Masters in Music."

2 That the first of these publications was issued by it in January, 1903; that they are regularly issued at stated intervals as frequently as four times a year, bear date of issue, are numbered consecutively, and are issued from the known office of publication of your orator hereinbefore set forth;

That these publications, each and every of them, are formed of printed paper sheets, without boards, cloth, leather or other substantial binding such as distinguish printed books for preservation from periodical publications;

That these publications, each and every of them, are devoted to the art and science of music, and that the musical compositions appended thereto are in illustration and exposition of the literature of the art printed and published in connection therewith, as appears by the copy of the first issue of said publication which your orator files herewith;

And your orator alleges that it has a legitimate list of subscribers, that it has not been designed primarily for advertising purposes or for free circulation or for circulation at nominal rates, that it made due application for the entry and admission of this periodical as mailable matter of the second class, which application complied with all the rules and regulations required by law and was approved by the postmaster at said Boston; and that your orator in the publication and issue of these publications has complied with all the terms, conditions and requirements of the laws of the United States relating to mailable matter of the second class;

That on January twentieth, 1903, your orator received the following notice:—

3 "OFFICE OF THE POSTMASTER,
BOSTON, MASS., *January* 20, 1903.

Messrs. Bates & Guild, pub. 'Masters in Music,' 42 Chauncy St., Boston, Mass.

GENTLEMEN: In compliance with your request, I enclose a copy of the letter from the Third Assistant Postmaster General relating to the exclusion of your publication from the mails as second class mail matter.

Respectfully, GEO. A. HIBBARD, *Postmaster.*"

"(Copy.)

WASHINGTON, D. C., *January* 17, 1903.

"Postmaster, Boston, Mass.

SIR: You are informed that admission to the second class of mail matter of the publication known as 'Masters in Music,' published

in your city by Bates & Guild Company, is denied, for the reason that the publication has, under the statute, the characteristics of third class matter, and not second class matter. (Act of March 3, 1879.) It is composed mainly of sheet music.

"You will inform the publisher of the denial of entry.

"The deposit, or deposits, made under section 441 of the postal laws and regulations to cover mailings of this publication pending consideration of the application for its admission, should be converted into ordinary postage stamps, attached to a sheet or
4 sheets of paper, canceled and sent to this office as directed in the said section.

Respectfully,

(Signed) EDWIN C. MADDEN,

"*Third Assistant Postmaster General.*"

And your orator on information and belief declares that these publications will be excluded from the mails as mailable matter of the second class in accordance with the foregoing decision of the Postmaster General.

4. That the denial of entry to the second class of mail matter on account of their having been composed mainly of sheet music, as declared by the respondent was unlawful;

That the exclusion of these publications from the mail as mailable matter of the second class will cause your orator great pecuniary loss and damage both in the advanced rates demanded and in the necessary reorganization of its business in distributing these publications, all of which increase in rates and charges will have to be borne by your orator in those cases where existing contracts require it.

5. That your orator is liable, under existing contracts, to supply upwards of eighty thousand copies of these publications at a price based upon the postage rates chargeable upon them as mailable matter of the second class.

6. That the action of the Postmaster General in excluding these publications from the mails and denying to them the privilege of mailable matter of the second class as hereinbefore set forth, is a reversal of and contrary to the practice sanctioned by him and his predecessors in office in regard to publications similar in character, and that your orator incurred the expense attending the preparation and publication of the excluded publications relying upon said practice;

5 That the right to have these publications carried in the mails as mailable matter of the second class is a valuable property right exceeding in value the sum of five thousand dollars.

Forasmuch as your orator is without a plain, adequate and complete remedy at law, and because if remediable at law relief could only be obtained by a multiplicity of suits, your orator prays:

First. That your orator may be declared to be entitled to have these publications entered, received and transmitted through the mails as mailable matter of the second class, as defined by the act of Congress approved March 3, 1879.

Second. That it may please the court to grant an injunction restraining the respondent from enforcing the denial of entry set forth in paragraph 3 of this bill, and requiring him to receive said publications and transmit the same through the mail as mailable matter of the second class, in accordance with the provisions of said act of Congress approved March 3, 1879.

Third. For such other and further relief as, under the facts stated, your orator may be entitled and in equity may seem meet.

Fourth. And your orator prays also for a preliminary injunction and that your honors will grant a writ of subpœna directed to said respondent, requiring him to answer this bill, but not under oath, the answer under oath being hereby expressly waived, and show cause why the prayers of this bill should not be granted.

BATES & GUILD CO.,
By DAWES E. FURNESS, *President.*

WM. S. HILL, *Of Counsel.*

6 UNITED STATES OF AMERICA, }
State of Massachusetts. }

BOSTON, *January 22nd*, 1903.

On this twenty-second day of January, 1903, personally appeared Dawes E. Furness, who being by me duly sworn deposes and says that he is the president of The Bates & Guild Company, the complainant within named; that he has read the foregoing bill of complaint subscribed by him, and knows the contents thereof and that the same is true except as to the matters therein stated to be alleged on information and belief, and as to such matters he believes it to be true.

Sworn to and subscribed before me this twenty-second day of January, 1903.

[NOTARIAL SEAL.] JOHN ABBOTT,
Notary Public.

HOLMES CONRAD,
Sol. for Compl'ts.

COMMONWEALTH OF MASSACHUSETTS,
OFFICE OF THE SECRETARY,
BOSTON, *Jan'y* 22, 1903.

I hereby certify, that at the date of the attestation hereto annexed John Abbott was a notary public for the said Commonwealth, duly commissioned and constituted, that as such notary public, he was by law authorized to administer oaths and take acknowledgments of deeds and other instruments throughout the Commonwealth; that to his acts and attestations, as such, full faith and credit are and ought to be given in and out of court; and that I believe the signature to the annexed attestation to be genuine.

In testimony whereof, I have hereunto affixed the seal of the Commonwealth the date first above written.

[SEAL.] WM. M. OLIN,
Secretary of the Commonwealth.

7 *Rule to Show Cause.*

Filed Jan. 27, 1903.

In the Supreme Court of the District of Columbia.

THE BATES AND GUILD COMPANY
vs.
HENRY C. PAYNE, Postmaster General of the United States. } No. 23722. Equity.

On consideration of the bill of complaint this day filed it is this 27th day of January, 1903, by this court adjudged and ordered, that the defendant shall show cause in this court on the 24th day of February, 1903, why the prayer of the said bill should not be granted.

A. B. HAGNER,
Asso. Justice.

Marshal's Return.

Executed the within rule by serving a copy thereof on the defendant Henry C. Payne, personally Feb. 12, 1903.
AULICK PALMER, *Marshal.*
S.

8 *Answer.*

Filed Feb. 25, 1903.

In the Supreme Court of the District of Columbia.

BATES AND GUILD COMPANY
vs.
HENRY C. PAYNE, Postmaster General. } In Equity. No. 23722.

Answer of the defendant, The Postmaster General, to the bill of complaint of the above-named complainant, and to the rule to show cause why injunction should not be granted thereon.

The defendant now and at all times hereafter saving and reserving to himself all and all manner of benefit or advantage of exception that may be taken to the said bill for the many errors, uncertainties and imperfections thereof, for answer thereto, or to so much thereof as he is advised that it is necessary or material for him to make answer unto, answering says:

I.

The defendant admits the allegations of the first paragraph.

II.

The defendant admits the allegations of the second paragraph.

III.

For answer to the third paragraph the defendant, upon information and belief, admits that the complainant as a publisher has been and is engaged in publishing a series of publications known and described as "Masters in Music;" but the defendant denies that the said publications are a "periodical publication" within the meaning of the act of March 3, 1879, establishing the second class of mailable matter.

The defendant admits that the first of said publications was issued by the complainant in January, 1903, and avers that such publication of January, 1903, is the only publication of the series known and described as "Masters in Music" of which this defendant has any knowledge or cognizance whatever. Inasmuch as but one
9 publication known to the defendant has been published under the name of "Masters in Music" the defendant is unable to admit that the said publications are published as frequently as four times a year, or bear a date of issue, or are numbered consecutively, or are issued from the known office of publication of the complainant, or that said publications or each and every of them are formed of printed paper sheets without boards, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications; or that said publications or each and every of them are devoted to the art and science of music.

But this defendant says that on or about January 5, 1903, the complainant, The Bates and Guild Company, by Winthrop Ames, treasurer, did, at the post office at Boston, Massachusetts, make an application to have the publication "Masters in Music" designated as a magazine published at said Boston admitted to the mails at the second-class rates of postage. That in and by its said application the complainant stated that the said publication was devoted to "the arts: being devoted to the history, appreciation, execution, and news concerning music of a public character," that said publication was intended to be a monthly, that its known office of publication was 42 Chauncey street, Boston, Massachusetts, that the first issue was to appear on January 1, 1903, that the complainant, the publisher, was the only person interested financially in said publication, that the editor of said publication was Daniel Gregory Mason, instructor in music in Princeton university, that the said publication had 2045 legitimate subscribers, of whom 1059 were at the full advertised subscription price direct to the publisher solely for the value of the publication and without any other inducement, premium, gift, chance to win a prize or other consideration whatsoever, and that the subscription price of said publication was $2.00 per year.

The defendant further avers that in due course of adminis-
10 tration the said application came to the Third Assistant Postmaster General, who, in the distribution of powers and

duties in the Post Office Department is charged with the duty to decide whether or not a publication is entitled to transmission in the mails at the second-class rates of postage and to determine accordingly for and on behalf of the Postmaster General; that such application together with a copy of the publication itself, was duly examined and considered by said Third Assistant Postmaster General; that as a result of such examination and consideration the said Third Assistant Postmaster General, acting for the Postmaster General in that behalf, became and was and still is of the opinion and judgment that the said publication had not and has not the characteristics of second class mail matter under the provisions of the act of March 3, 1879, but on the contrary had and has the characteristics of third-class matter under said statute, and the said Third Assistant Postmaster General held and determined accordingly that the same was not entitled to transmission at the second-class rates of postage.

The defendant further says that in accordance with such determination the said Third Assistant Postmaster General, acting for this defendant in that behalf, on or about January 17, 1903, notified the postmaster at Boston, Massachusetts, as follows:

"You are informed that admission to the second class of mail matter of the publication known as 'Masters in Music,' published in your city by Bates and Guild Company, is denied, for the reason that the publication has, under the statute, the characteristics of third class matter, and not second class matter. (Act of March 3, 1879.) *It is composed mainly of sheet music.*

You will inform the publisher of the denial of entry.

The deposit, or deposits, made under section 441 of the Postal Laws and Regulations, to cover mailings of this publication pending consideration of the application for its admission, should be converted into ordinary postage stamps, attached to a sheet or sheets of paper, canceled and sent to this office as directed in the said section."

Thereupon the postmaster at Boston, on January 20, 1903, sent the complainant the notice set forth in the third paragraph of complainant's bill.

11 And this defendant denies that said publications will be excluded from the mails as mailable matter of the second class and says that on the contrary said publications have never been admitted to the mails as mailable matter of the second class, but that the application for such admission was, upon due consideration as aforesaid, rejected, and the said publications refused admission to the second class of mailable matter.

The defendant further says that the said publications, as evidenced by the copy thereof submitted to the Third Assistant Postmaster General with the application for admission, as well as evidenced by the copy annexed as an exhibit to the bill of complaint herein, is not a "newspaper or other periodical publication" within the intent and meaning of section 10 of the act of March 3, 1879, chapter 180. Defendant further says that the said publication falls

within the third class into which mailable matter is divided by section 7 of the said act, namely: "Third. Miscellaneous printed matter," and that it has the characteristics of such mail matter of the third class as designated by section 17 of the said act, namely: "Books, transient newspapers and periodicals, circulars and other matter wholly in print (not included in section 12) proof sheets, corrected proof sheets and manuscript copy accompanying the same."

The defendant further says that the said publication has the characteristics of third-class mail matter aforesaid in that it is a book, to wit: a collection of sheet music by a single composer prefaced by notes and criticisms upon the work of such composer; that in respect of the matter purporting to be literary contained in said publication, it is, in substance and effect, a series of notes illustrative of the music aforesaid, or a monograph upon the life and work of said composer; that such matter therein contained has not the characteristics of currency or miscellany common to "newspapers and other periodical publications;" that it relates to a single subject
12 and to a single individual, and that it is introductory and prefatory to the main and substantial contents of said publication, namely: sheet music. The defendant further says that such matter purporting to be literary is not matter of the second class such as is contained in "newspapers and other periodical publications," but is matter of the third class such as is contained in "books" or "transient periodicals" and is not distinguishable therefrom. With respect to the main contents of the said book, namely: sheet music, the defendant says that sheet music is matter of the third class, being "other matter wholly in print" within the intent and meaning of section 17 of the act of March 3, 1879.

The defendant says that so far from being a "periodical publication" of the second class, the publication published under the title "Masters in Music" is a series of distinct monthly monographs; that each monthly publication has for its subject a distinct composer of music; that each publication is complete in itself and is a reprint of a collection of sheet music by the particular composer with which such publication is concerned; that such publications have no true relation or connection one with another, but that they are designed to follow one another monthly in such manner as to form a wholly disconnected and varied succession of distinct collections of sheet music, prefaced by explanatory, biographical, critical, and bibliographical comment; that the only connection between the successive publications consists in the fact that over the name of the particular composer with which such publication is concerned are printed the words "Masters in Music. A Monthly Magazine," and that such publications are numbered successively. That in confirmation of the foregoing statement the defendant refers to the January number of said publication, the whole of which is concerned with the composer Mozart, and upon the cover of which over the name "Mozart" appear the words "Masters in Music. A Monthly Magazine," and to the fact that in said copy of
13 January there appears an announcement as follows:

"*Masters in Music.*

The second, February, issue of Masters in Music will have for its subject

CHOPIN.

Contents.

A portrait of Chopin: From the medallion by Bovy.
A life of Chopin: Based upon the most authentic accounts.
The art of Chopin: Brief extracts giving a summary of what the most eminent critics consider the essentials of his genius.

Musical Selections.

I.	Nocturne in F-minor	Opus 55, No. 1
II.	Prelude in D-flat	No. 15
III.	Etude in G-flat	'The Butterfly'
IV.	Scherzo and largo from the sonata in B-minor	Opus 58
V.	Waltz in D-flat	Opus 64, No. 1
VI.	Two mazurkas	Opus 17, Nos. 1 and 3
VII.	Polonaise in A-major	'The Military Polonaise'

Editorial notes will accompany the above selections, suggesting the interpretations.

Price, twenty cents.

Bates & Guild Co., 42 Chauncy street, Boston."

Defendant further denies that the term "magazine" upon the cover of said publication is a true designation of its contents, and avers that the said publication is not a magazine in any sense of the word, but is a book, or part of a book, in support of which statement defendant respectfully refers to a copy filed with the bill as an exhibit, by an inspection whereof it will appear that no designation of the publication as a magazine, no date of issue, and no serial number appear therein from the first page to the last page of the same, but stripped of its cover no mark or sign or designation of such publication as a periodical appears thereon.

14 And the defendant respectfully craves leave to refer, as a part of this answer, to the copy of said publication annexed as an exhibit to the bill herein, and submits that the true character and nature of the said publication will appear by an inspection thereof to be that of mail matter of the third class.

The defendant further says that although each of said publications relates to the subject of music, namely: a certain composer thereof of sufficient distinction to be designated a master or classic, it nevertheless is not devoted to "the arts" within the intent and meaning of the act of March 3, 1879, for the reason that it is not a continuing, permanent "periodical publication" within the accepted and statutory meaning of that term, the contents of which are devoted to the arts and have the characteristics of miscellany and currency such

as denote periodical publications and magazines in general, but that, save in the sense that the subject matter of such publication is the art of music, wherein it differs in no sense or particular from any other collection of sheet music or of any other book relating to music, the said publication does not comply with the statutory requirements of sections 10 and 14 of the act of March 3, 1879.

And the defendant is further informed and believes, and so believing avers, that said publications and the series of the same are not designed as a magazine devoted to the subject of music, but as a series of separate and independent works, each upon a different composer, largely for the purpose of affording a series of texts for instruction in and the study of music, and that each of said texts, in respect both of the sheet music therein contained and of the biographical, critical and bibliographical comment is complete in itself; and the defendant further says that the publications published under the title "Masters in Music" are not a "periodical publication" but a series or library of publications.

15 IV.

For answer to paragraph four, the defendant respectfully refers to the preceding answer to paragraph three. He is not informed and can neither admit nor deny that the refusal to transmit said publications as mailable matter of the second class will cause the complainant great pecuniary loss and damage, but so far as this defendant is informed such refusal would result merely in the payment by complainant of the third-class rate of postage upon such publications if the complainant transmits the same through the mails of the United States.

V.

The defendant can neither admit nor deny the allegations of the fifth paragraph, but submits that if the complainant is under existing contracts to supply 80,000 copies of these publications, it is under contracts to supply the same to persons other than the designated subscribers thereof.

VI.

The defendant denies that the action of the Postmaster General in refusing to admit these publications to the second class of mailable matter is a reversal of, or contrary to, the practice sanctioned by him and his predecessors in office in regard to publications similar in character; but the defendant further submits that the admission and transmission of mailable matter under the terms prescribed by the statutes is a continuous administrative act, the performance of which is devolved by law upon this defendant as Postmaster General for the time being, and in the performance of this duty he is in no wise bound or controlled by the action of his predecessors, nor does the admission and transmission by one Postmaster General of mailable matter of a certain description at the second class or any other particular rates constitute any obligation whatever upon the United

States or its officers thereafter to admit publications similar in character to the same rate.

16 The defendant denies that the complainant has any right to have said publications transported in the mails as mailable matter of the second class, but he is unable to admit or deny that if said supposed right exists it exceeds in value the sum of five thousand dollars.

Answering generally to the whole bill, the defendant says, that, as Postmaster General of the United States, he is charged by law with the duty of superintending generally the business of the Post Office Department and of executing all laws relative to the postal service. That among his duties is that of classifying the mail matter offered for transmission through the United States mail and distributing the same into the respective classes created and designated by Congress; in course of which classification it becomes incumbent upon him to investigate and ascertain whether matter offered for transmission as second-class matter does or does not comply with the conditions upon which the law permits publications to be admitted to the second-class rates; that such investigation, exercised by this defendant as the head of an executive department in the ordinary discharge of his duties, requires an inquiry into facts, an examination of evidence and an interpretation of law; and that in the case of the publication hereinbefore mentioned, after an inquiry into the facts relevant and material to the inquiry, an examination of evidence and a construction of the law and application thereof to the facts, the defendant found and determined that said publications now offered for transmission, not having the statutory characteristics of second-class matter, but on the contrary the characteristics of third-class matter, and not fulfilling the conditions established by law for second-class matter, were not entitled to admission to the mails at the second-class rate, and the application for that rate of postage was therefore denied; which said finding,

17 determination and decision involved the exercise of judgment and discretion on the part of this defendant, and the Third Assistant Postmaster General acting in that behalf, and for that reason, as defendant respectfully submits, is not subject to be reviewed by this honorable court.

Defendant is further advised, and so believing avers, that the privilege of having publications, which comply with the conditions of second-class matter as defined in the act of March 3, 1879, transmitted at the second-class rate is not a property right; and that whether publications do so comply with such conditions is a matter wholly within the competence and jurisdiction of the Postmaster General, and the determination of which is within the judgment and discretion of the Postmaster General for the time being.

And the defendant respectfully submits that complainant in and by its said bill and the matters and things set forth therein does not make or state such a cause as would entitle the complainant to the relief thereby prayed; and as to so much of the said bill as prays an injunction against the enforcement by this defendant of his de-

cision that the said publications are not entitled to transmission at second-class rates, this defendant submits that it is against the course and practice and not within the jurisdiction of this court to interfere with, review or afford relief against the decision and action of the head of an executive department in a matter involving the exercise of his judgment and discretion, or to require the Postmaster General, as an executive officer, to perform a supposed duty in the admission of mailable matter by an injunction forbidding him to refuse to perform said duty, in which respect the defendant respectfully submits that the complainant has a plain, adequate and complete remedy at law by a writ of mandamus.

And defendant hopes he will have the same benefit of these defences as if he had formally demurred to the said bill upon the ground thereof. And having fully answered, the defendant
18 prays to be hence dismissed with his reasonable costs.

H. C. PAYNE,
Postmaster General.

ASHLEY M. GOULD,
HENRY H. GLASSIE,
Solicitors for the Defendant.

DISTRICT OF COLUMBIA, *ss:*

Henry C. Payne, Postmaster General, being first duly sworn, deposes and says that he has read the foregoing answer by him subscribed and knows the contents thereof, and the matters and things therein set forth he knows to be true, save those stated upon information and belief, which he believes to be true.

H. C. PAYNE,
Postmaster General.

Subscribed and sworn to before me this twenty-fourth day of February, A. D. 1903.

[Seal of Thomas E. Roach, Notary Public, District of Columbia.]

THOS. E. ROACH,
Notary Public.

19 *Replication.*

Filed Mar. 10, 1903.

In the Supreme Court of the District of Columbia.

BATES AND GUILD COMPANY
vs.
HENRY C. PAYNE, Postmaster General. } In Equity. No. 23722.

The complainant joins issue upon the answer of the defendant, and will submit the cause on bill and answer.

HOLMES CONRAD,
Sol. for Complainant.

Decree.

Filed Mar. 10, 1903.

In the Supreme Court of the District of Columbia.

BATES AND GUILD COMPANY
vs.
HENRY C. PAYNE, Postmaster General. } In Equity. No. 23722.

This cause coming on to be heard on the bill and the exhibits filed therewith on the answer of the defendant and on the papers filed in the cause, and on the proceedings had therein, was argued by counsel. In consideration thereof it is this 10th day of March, 1903, adjudged, ordered and decreed.

(1) That the complainant, The Bates and Guild Company, is entitled to have its publication, entitled "Masters in Music" entered, received and transmitted through the mails as mailable matter of the second class, as defined by the act of Congress approved March 3, 1879.

(2) That the defendant The Postmaster General, be and he hereby is perpetually restrained from denying to the complainant the receipt, entry and transmission through the mails, of its publication entitled "Masters in Music" as mailable matter of the second class, as defined by the act of Congress, approved March 3, 1879 and also from refusing to receive said publication and transmit the same through the mails as mailable matter of the second class, as defined aforesaid.

(3) That the complainant do recover of the defendant his costs incurred in this suit, and may have execution therefor as at law.

A. B. HAGNER,
Asso. Justice.

And the defendant in open court by direction of the Post Office Department and acting under that direction, prays an appeal to the Court of Appeals which is hereby allowed.

A. B. HAGNER.

21 *Stipulation.*

Filed Mar. 20, 1903.

In the Supreme Court of the District of Columbia.

BATES AND GUILD CO.
vs.
PAYNE, Postmaster-General. } Eq. No. 23722.

It is stipulated by and between counsel for the respective parties that the exhibits filed with the bill in this cause may be certified by the court to the Court of Appeals with the transcript of the

record in lieu of a copy thereof and that in the Court of Appeals, the printing of such exhibit shall be dispensed with and the same used at the hearing and inspected and examined by the Court of Appeals as a part of the record on appeal.

HOLMES CONRAD,
Solicitor for Complainants.
MORGAN H. BEACH,
HENRY H. GLASSIE,
Solicitors for Defendant.

22 *Directions to Clerk for Preparation of Transcript.*

Filed Mar. 20, 1903.

In the Supreme Court of the District of Columbia.

BATES & GUILD CO. *vs.* PAYNE, Postmaster-General. } Eq. No. 23722.

The clerk of the court in making up the record on appeal in this cause will include: (1) bill of complaint and rule to show cause; (2) answer of the defendants; (3) replication; (4) decree; (5) opinion and (6) stipulation as to printing exhibits.

MORGAN H. BEACH,
HENRY H. GLASSIE,
Solicitors for the Defendant.

HOLMES CONRAD.

23 *Opinion of Justice Hagner.*

Filed Mar. 20, 1903.

In the Supreme Court of the District of Columbia.

BATES & GUILD COMPANY *vs.* HENRY C. PAYNE, Postmaster-General. } No. 23722. In Equity.

Opinion by Mr. Justice Hagner.

The bill in this case was filed the 27th of January, 1903. It alleges that the complainant company were publishers of books and periodicals in Boston prior to January, 1903, and as such are engaged in issuing a series of periodical publications described as "Masters in Music;" the first of which was issued in January. And the bill proceeds to allege compliance by the complainants with the various formal requirements of the act of 1879 authorizing the issue to the company of a certificate of entry admitting its publications to the rates of second class postage.

That after issuing said first number, the company applied for such certificate to the postmaster at Boston, who approved of the application: but on the 20th day of January, 1903, complainants received from said postmaster a copy of a letter from the Third Assistant Postmaster-General informing them that admission of the publication in question to the second class of mail matter was denied for the reason that the publication has, under the statute, the characteristics of third class mail matter, and not of second class matter—that it is composed mainly of sheet music.

They charge that the exclusion of their said publication as second class matter will entail great pecuniary loss upon them, as they are liable to furnish 80,000 copies of the publication at a
24 price based upon the postage rates of second class matter. They charge that such refusal is a reversal of, and contrary to the practice sanctioned by defendant and his predecessors, and that the company would sustain great pecuniary loss if their publications are thus excluded from the second class of mail matter. Wherefore they pray they may be declared entitled to have their said publications so admitted to the mails as mailable matter of the second class; and that an injunction may be granted restraining the Postmaster-General from enforcing his denial of entry, and requiring him to transmit the said publications as mailable matter of the second class, and for further relief.

The answer of the Postmaster-General, after various formal admissions of fact, declares he is unable to determine whether complainant's publication fulfils the various requirements of the act of Congress applicable to second class matter, which he proceeds specifically to recite, inasmuch as only one number of the publication has yet been issued.

He admits that about January 5, 1903, complainant company, by one of its officers, applied to the Boston post office to have said publication admitted to second class rates, and recites the various statements contained in the application, alleging the compliance of the company with the various prerequisite requirements of the statute; that the Third Assistant Postmaster-General, who was charged with the duty to decide whether publications are entitled to transmission at second class rates made such examination and became, and still is, of the opinion and judgment that the publication so offered was not so entitled for the reasons stated in the bill and in the letter therein set forth.

Further answering he says the said publication is not a newspaper or other periodical publication, but falls within the third class of mailable matter, inasmuch as it is a book, being a collection of sheet music by a single composer, prefaced by notes and criticisms, as he proceeds to explain at length; and that no date of issue or
25 serial number appears upon it anywhere. Denying his present decision is a reversal of the present practice of himself and his predecessors, he insists his action with respect to the subject in hand is a continuous administrative act, involving the exercise of judgment and discretion, and, therefore, as Postmaster-General, he

is not bound by the action of his predecessors, and his present action is not subject to be reviewed by this court.

So far as the pleadings in this case present the question of the jurisdiction of this court to examine into the legality and the correctness of the decision of the Postmaster-General as to the proper construction of the statute of 1879; and as to the further question, whether his decision and determination that the publication referred to in the pleadings is not entitled to entry as second class mail matter, I conceive my decision in the case of Houghton, *et al.*, against The Postmaster-General, No. 23,342, equity, just delivered, is conclusive upon me in this. Of course, the facts are naturally different in the cases, but the principle upon which I discussed the facts in the first case leads me to precisely the same conclusion in the present. There are two questions presented in the present proceedings which were not raised in the former.

The first is, that as only one number of the "Masters in Music" had been issued when the application of the complainant company was made and refused, no certificate can now be issued as it is impossible to say whether at least three more numbers would be issued within the year. If this contention were to be sustained, it would be impossible ever to start such a publication as second class matter, for the four numbers could not be admitted to that class without a previous order allowing it, and as no such order could be passed until the four numbers had been issued; thus nothing ever could be done by way of inaugurating it, a new enterprise of this character.

More reliance seemed to be placed on the contention that the complainant had mistaken its remedy, and should have applied to a court of law for a writ of mandamus. That the writ of in-
26 junction in equity and of mandamus at law are somewhat correlative is conceded. The difference between the circumstances of cases justifying the appeal to the one form of remedy rather than the other, are well stated in 92 U. S., 531, *Board of Liquidation vs. McComb.*

That case came before the Supreme Court on an appeal from a decree in equity of the circuit court of the United States for the district of Louisiana, granting an injunction at the suit of a bondholder against the board of liquidation of that State. The Supreme Court first examined the facts of the case, and decided the complainant was entitled to relief of the nature claimed. As he had invoked and obtained a decree for an injunction, naturally the losing party insisted the remedy should have been sought by a mandamus, and supported its contention by the usual arguments. Mr. Justice Bradley, approaching that branch of the case, disposed of the objection as follows:

"But is has been well settled that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which ade-

quate compensation can not be had at law, may have an injunction to prevent it. In such cases the writs of mandamus and injunction are somewhat correlative to each other."

It is true the distinctions pointed out in the opinion of Mr. Justice Bradley have not always been observed by counsel, nor, apparently by some of the courts, though it may be that careless reports have failed to point out the differentiating facts. Justice Bradley's language is almost reproduced by Justice Peckham in the School of Magnetic Healing case, 157 U. S., 110, to which I referred in the previous case, which was an application for an injunction. The court there said:

"In other words, irreparable injury will be done to these complainants by the mistaken act of the Postmaster-General in directing the defendant to retain and refuse to deliver letters addressed to them. The Postmaster-General's order, being the result of a mistaken view of the law, could not operate as a defense to this action on the part of the defendant, though it might justify his obedience thereto until some action of the court. In such a case as the one before us, there is no adequate remedy at law, the injunction to prohibit the further withholding of the mail from complainants being the only
27 remedy at all adequate to the full relief to which the complainants are entitled."

As counsel for the defendant cited a Maryland case upon this point, I will refer to another. Legg and others *vs.* The Mayor, etc. of Annapolis, 42 Md. 225. The legislature of Maryland in 1874, passed an act authorizing the governor to appoint three police commissioners to whom was to be committed the power practically to supersede the corporate government and control the city. The corporate authorities, insisting the act was not legally passed, its adoption having been procured by fraud, attempted to frustrate the scheme, by suing out a mandamus to compel the so-called commissioners to abstain from interfering with the city government in any way. The circuit court ordered the writ. In the court of appeals the other contentions of the corporation were practically sustained, but it was further objected the proper remedy was not by mandamus at law, but by injunction in equity. On pages 225–6 Judge Alvey in discussing this point, used the following language, which I shall cite at length, as it may aid in removing the confusion into which counsel sometimes fall in considering the points of distinction between these "somewhat correlative remedies":

"3. The next and last question is, whether the petition of the appellees presented a case proper for the issue of a mandamus; and this question is important to be decided, as upon its decision depends whether the case shall be remanded, or be dismissed, without further proceeding.

According to the allegations of the petition in this case, the appellees are in office exercising all the duties and functions thereof, and the appellants, though appointed to the new office created by the statute of 1874, chapter 421, have not entered upon the duties of that office, and have in no manner interfered with the appellees in

the exercise of the office they hold. The appellants are not charged with withholding anything that pertains to the office of the appellees, nor even with exercising powers and privileges that are in conflict with those exercised by the latter. It is alleged that the appellants have been appointed by the governor under the act of 1874, as police commissioners, and that, as the appellees are informed, they have accepted the appointment, or intend to accept the same, 'and undoubtedly propose and design, unless restrained from so doing, to exercise all and singular the powers pretended to be conferred on them as a board of police commissioners, by said pretended law." The petition then proceeds to *to* pray that a writ of mandamus may issue to the appellants, 'commanding them, and each of them, to surcease and desist from exercising, or assuming to exercise, in any manner, any power or authority or jurisdiction under the said pretended act, by the appointment of any police or otherwise; and further commanding them, and each of them, to abstain from interfering, or attempting to interfere, with the police depart-
28 ment established by your petitioners, under their said charter and ordinances, and from hindering, obstructing, resisting or opposing, the executive officers of said city, in the exercise of their lawful powers, and in the discharge of their official duties.'

This is the usual prayer for an injunction, in a bill in equity, to restrain an unlawful interference with rights; but we are not aware of any precedent for the use of the writ of mandamus to accomplish such a purpose. *Mandamus* is a writ commanding the performance of some act or duty, therein specified, in the performance of which the applicant for the writ is interested, or by the non-performance of which he is aggrieved or injured. *Reg. vs. Bishop of Chichester, 2 Ell. & Ell.*, 209. But as simply a preventive remedy it has never been used, so far as we have been able to discover. The nature of the writ, and the end for which it was framed, direct upon what occasion it should be used. It was introduced to prevent disorder from a failure of justice, and defect of police. Its use is therefore confined to those occasions where *the* law and good government there ought to be one. *6 Bac. Abr., Tit. Mand.*, 418. But there can be no want of remedy for any illegal or improper interference with the exercise of the powers and duties legally pertaining to the office of the appellees."

"In the case of Ray *v.* Peach, 2 Salk, 572; a dissenting minister being qualified to preach under the toleration act, and being illegally convicted for the exercise of his right, and supposing he would be further prevented from exercising his right to preach, except at his peril of abiding a conviction therefor, applied for a mandamus to be permitted to preach, but the writ was denied and the court held, "That a mandamus is always to do some act in execution of law; whereas the writ, if issued in that case, could be in the nature of a *writ de non molestando*. And in accordance with this Ch. Baron Comyns, in his Dig. Tit. Mand. (*b*) lays it down as settled that a mandamus does not lie to prevent a molestation against the law. Tapp. on Mand., 189, 190.

"Taking this to be an established principle upon the subject, there is no proper case stated in the petition of the appellees to justify the issuing of the writ. The application was founded entirely upon an apprehension that the appellees might be disturbed or molested in the exercise of some of the functions and powers that have heretofore belonged and may still pertain to their office. To grant the writ in such case, would be simply making it a substitute for an injunction.

"We think the petition ought to be dismissed, and we shall
29 therefore reverse the order appealed from, and dismiss the petition with costs to the appellants."

Objection is also made to the application because it asks for a mandatory injunction to require the Postmaster-General to transmit the publication as second class mailable matter. A prayer for an unauthorized form of relief in connection with others which are appropriate, is not necessarily fatal to the application, since the court may grant such relief as is proper although it may refuse the untenable prayer. It may be well, however, to consider whether there is ground for the contention that it would be improper to order an injunction in a mandatory, as well as in the usual form. The familiar law as laid down in the text-books, is thus stated by High on Injunctions, vol. 1, sec. 2:

"Injunctions are known as mandatory or preventive, according as they command defendant to do or to refrain from doing a particular thing. While the jurisdiction of equity by way of mandatory injunction is rarely exercised, and while its existence has even been questioned, it is nevertheless too firmly established to admit of doubt. Mandatory injunctions are seldom allowed before a final hearing, though they may be granted on interlocutory applications. And while a court of equity is always reluctant to grant a mandatory injunction upon an interlocutory application and before final hearing, it may yet do so in an extreme case when the right is clearly established and the invasion of the right results in serious injury. And when there is a wilful and unlawful invasion of plaintiff's right, against his protest and remonstrance, the injury being a continuing one, a mandatory injunction may be granted in the first instance. It is to be observed, however, that courts of equity rarely interfere to command the doing of a positive act, but the same result is obtained by framing the injunction in an indirect form and prohibiting the defendant from doing the reverse of what he is desired to do. Even then the jurisdiction is exercised with extreme caution, and is confined to cases where the courts of law are unable to afford adequate redress, or where the injury can not be compensated in damages. And in determining whether to grant relief by way of mandatory injunction courts of equity will take into consideration the relative convenience and inconvenience which would result to the parties from granting or withholding the relief, and will be governed accordingly."

SEC. 358. Where proceedings have been instituted in a court of equity to establish the title to real estate, and a decree has been ren-

dered that defendant make a conveyance vesting the legal title in complainant, neglect to execute such decree will warrant a mandatory injunction to deliver possession. In such case equity proceeds upon the principle that its decree, not having been complied with, operates as a conveyance, and the right being sufficiently established an injunction is a proper remedy for its enforcement; otherwise complainant might be compelled to resort to proceedings in ejectment to obtain the possession to which he is already entitled by the decree, and thus be greatly delayed and embarrassed.

Id. § 358.

"An injunction is the appropriate remedy to protect a railway company in laying its track over lands which have been properly condemned, by restraining mill owners from keeping the water in their mill dam at such an unusual height as to flood complainant's track and to prevent its operations. And such an injunction, commanding the mill owners to refrain from raising the water beyond a specified height, is not regarded as a mandatory injunction."

Id. § 646.

* * * "And where the lessee of a mine had worked into complainant's premises and extracted a large quantity of ore therefrom, a mandatory injunction was granted requiring defendant to permit complainant to inspect the mine for the purpose of determining the extent of the injury."

Id. § 737.

* * * "So where party-walls are required by law to be of solid brick or stone, without openings, the erection by a lot owner of a party-wall containing windows constitutes such a nuisance as comes within the restraining powers of equity, and it will be enjoined. And in a case of nuisance to a dwelling-house, the injunction will be made mandatory if the circumstances of the case require it."

See also Nailor *v.* Corcoran, 6 Mackey, 580.

"One who has purchased personal property at a sale under execution, which is afterward proved to belong to a person other than the judgment debtor, who recovers it by due course of law, is not entitled to an injunction to restrain proceedings upon his bond given for the purchase money."

Id. § 80.

"In cases where relief by injunction is sought to prevent a deprivation of ancient rights, the question for determination is usually as to the degree of deprivation. And where a substantial injury is shown to result from the proposed erection and the darkening of plaintiff's lights, a court of equity may properly interfere. The test to be applied is, whether plaintiff's house is, by the obstruction which he seeks to enjoin, rendered in a substantial degree less fit for

purposes of occupation than before. In other words, the dim-
31 inution of light must be a substantial diminution, or one which renders plaintiff's house substantially less comfortable. This being shown, equity may interfere, even to the extent of making its injunction mandatory by directing the restoration of matters to the condition in which they were before defendant's erection was begun. And in the case of obstruction to ancient lights a mandatory injunction has been allowed, even before the hearing. But where it is shown that the obstruction which it is sought to enjoin is such as to interfere with the ordinary occupations of life, an injunction will be withheld, the real question to be determined being whether the light is so obstructed as to cause material inconvenience to the occupants of life. And when plaintiffs fails to show any substantial damage as likely to result to themselves, the relief will be withheld.

Id. § 860.

Id. 2 High, §§ 1150, 1158 and 1331.

Upon a full consideration of the authorities and, upon the justice of the cases, I see no reason why the injunction should not issue in a mandatory form and I shall so order.

A. B. HAGNER,
Asso. Justice.

32 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 31, inclusive, and the exhibit marked "Exhibit to Bill" transmitted herewith, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No 23,722, equity, wherein Bates & Guild Company is petitioner, and Henry C. Payne, Postmaster General, is respondent, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 24 day of April, A. D. 1903.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1309. Henry C. Payne, Postmaster General, appellant, *vs.* Bates & Guild Company. Court of Appeals, District of Columbia. Filed Apr. 25, 1903. Robert Willett, clerk

TUESDAY, *May 19th, A. D.* 1903.

HENRY C. PAYNE, Postmaster General, Appellant,
vs.
HENRY O. HOUGHTON, Trustee; GEORGE H. MIFFLIN, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton, and Albert F. Houghton, } No. 1303

and

HENRY C. PAYNE, Postmaster General, Appellant,
vs.
BATES AND GUILD COMPANY. } No. 1309

The argument in the above entitled causes was commenced by Mr. H. H Glassie attorney for the appellant, and was continued by Messrs. Wm. S. Hall and Holmes Conrad attorneys for the appellees and was concluded by Mr. John G. Johnson attorney for the appellant.

HENRY C. PAYNE, Postmaster General, Appellant,
vs.
BATES AND GUILD COMPANY. } No. 1309.

(Mr. Justice SHEPARD delivered the opinion of the court.)

The bill for injunction in this case is similar in respect of formal allegations to that in No. 1303, Payne *vs.* Houghton and others, with which it was argued and submitted by the same counsel.

The publication is entitled Masters in Music—a monthly magazine—and was begun in January 1903.

The first number filed as an exhibit with the bill, bears the imprint, Mozart. It contains a brief biographical sketch of the distinguished musician, some critical notes, and then thirty-two pages of sheet music selected from the compositions of the master.

Immediately after the publication of this first number, its admission to the mails as second class matter was demanded on the ground that it was a periodical publication within the meaning of the tenth section of the postal law, and complied with the conditions prescribed in the fourteenth section.

Permission was refused by the Postmaster General and the bill was filed January 27, 1903, for an injunction to restrain him from excluding the said publication from entry and transportation in the mails at second class rates.

As but one number of the Masters in Music had made it- appearance when the bill was filed, it is unnecessary to consider whether the contemplated series is subject to the objections raised against the Riverside Literature Series, in Payne *vs.* Houghton (recently decided) or may properly fall within the class of periodicals to which, as was held in that case, the second class mailing privilege is limited

When application was made to the Postmaster General, the question was one that unquestionably demanded the exercise of discretion in deciding it. As but one number had been issued, and that, stripped of its cover with the designation of "Magazine," would have all the appearance of an unbound book, the facts relating to the contents of future numbers could only be obtained from the representations made by the publishers.

Whilst he may undoubtedly accept these representations in the case of a new publication, when satisfied with the conformity of the first number, he is not bound to do so. If not satisfied he could insist upon a literal compliance with all of the conditions of section fourteen, before taking final action.

The facts of this particular case illustrate the danger of granting relief by way of mandatory injunction, as has been done in this case. By the terms of the final decree the complainant is declared "entitled to have its publication entered, received and transmitted through the mails as matter of the second class," and the Postmaster General is perpetually restrained from denying to the complainant the receipt, entry and transmission through the mails, of its publication entitled Masters in Music, as mailable matter of the second class * * *; and also from refusing to receive said publication and transmit the same," etc. No matter then what may be the particular contents of future numbers of the Masters of (in) Music, the Postmaster General is bound to receive and transport them as second class mail matter, as long as they retain a paper cover and bear the title of the first number issued.

We are of the opinion that the decision required of the Postmaster General in the application of the complainant was not a mere formal or ministerial act.

As was said in the recent case of U. S. *ex rel. v.* Hitchcock (U. S. Supreme Court May 18, 1903): "Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under these circumstances to review his determination by mandamus or injunction. If this writ were granted we would require the Secretary to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make. * * * The responsibility as well as the power rests with the Secretary, uncontrolled by the courts."

The decree will be reversed with costs and the cause remanded with direction to dismiss the bill. It is so ordered.

Reversed.

FRIDAY, *June 5th, A. D.* 1903.

HENRY C. PAYNE, Postmaster General, Appellant,
vs.
BATES AND GUILD COMPANY.
} No. 1309, April Term, 1903.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby, remanded to the said supreme court with directions to dismiss the bill.

Per MR. JUSTICE SHEPARD.

June 5, 1903.

Court of Appeals of the District of Columbia.

HENRY C. PAYNE, Postmaster General, Appellant,
vs.
BATES AND GUILD COMPANY, Appellee.
} No. 1309, April Term, 1903.

Now comes Bates and Guild Company, the appellee in the above entitled cause, and moves and prays an appeal to the Supreme Court of the United States from the decree of this court in said cause rendered on the 5th day of June, A. D. 1903, and that said appeal be allowed and that the amount of bond be fixed to act as a supersedeas, and as a continuance of the injunction pending said appeal.

HOLMES CONRAD,
Solicitor for Appellee.

Appeal allowed to the Supreme Court of the United States, as moved for and prayed, and amount of bond to act as a supersedeas, and as a continuance of the injunction pending said appeal fixed at the sum of one thousand dollars.

By the court:

M. F. MORRIS,
SETH SHEPARD,
Associate Justices.

(Endorsed:) No. 1309. Henry C. Payne, Postmaster General, *vs.* Bates and Guild Co. Motion for appeal to Supreme Court U. S., order allowing same & fixing amount of bond to act as a supersedeas at $1,000. Court of Appeals, District of Columbia. Filed Jun- 15, 1903. Robert Willett, clerk.

(*Bond on Appeal.*)

Know all men by these presents, that we, Bates and Guild Company, as principal, and American Surety Company of New York a corporation existing under the laws of the State of New York, having an office and usual place of business in Boston Massachusetts, as surety, are held and firmly bound unto Henry C. Payne, Postmaster General in the full and just sum of ($1000) one thousand dollars, to be paid to the said Henry C. Payne, Postmaster General, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, successors executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-second day of June, in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said court, between Henry C. Payne, Postmaster General, and Bates and Guild Company, No. 1309, April term, 1903 a decree was rendered against the said Bates and Guild Company and the said Bates and Guild Company having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Henry C. Payne, Postmaster General citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, that if the said Bates and Guild Company shall prosecute said appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal Bates & Guild Co.]

BATES & GUILD CO. [SEAL.]
DAWES E. FURNESS, *Pr.*

[Seal of American Surety Co. of N. Y.]

AMERICAN SURETY COMPANY OF NEW YORK, [SEAL.]
By WALLACE H. HAM, *Resident Vice President.*
Attest: ELIPHALET F. PHILBRICK, [SEAL.]
Resident Ass't Secretary.

Sealed and delivered in presence of—

—— ——.

Approved by—
M. F. MORRIS,
Associate Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 1309. Henry C. Payne, Postmaster General, appellant, *vs.* Bates and Guild Company. Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed June 25, 1903. Robert Willett, clerk.

UNITED STATES OF AMERICA, *ss:*

To Henry C. Payne, Postmaster General, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Bates and Guild Company is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable M. F. Morris, associate justice of the Court of Appeals of the District of Columbia, this 25th day of June, in the year of our Lord one thousand nine hundred and three.

M. F. MORRIS,
Associate Justice of the Court of Appeals of the District of Columbia.

Service accepted this 25th day of June, 1903.

HENRY H. GLASSIE,
Special Assistant to the Attorney General, Attorney for Appellee.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun-25, 1903. Robert Willett, clerk.

Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 29 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Henry C. Payne, Postmaster General, appellant, *vs.* Bates and Guild Company, No. 1309, April term, 1903, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 2d day of July, A. D. 1903.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 19024. District of Columbia Court of Appeals. Term No. 373. Bates & Guild Company, appellant, *vs.* Henry C. Payne, Postmaster General. Filed July 28th, 1903.

28107

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

HENRY O. HOUGHTON, TRUSTEE, ET AL., appellants,
v.
HENRY C. PAYNE, POSTMASTER-GENERAL, appellee. } No. 372.

BATES & GUILD COMPANY, APPELLANT,
v.
HENRY C. PAYNE, POSTMASTER-GENERAL, appellee. } No. 373.

ORMOND G. SMITH ET AL., APPELLANTS,
v.
HENRY C. PAYNE, POSTMASTER-GENERAL, appellee. } No. 481.

MOTION TO ADVANCE.

Comes now the Solicitor-General, on behalf of the appellee, Henry C. Payne, Postmaster-General, and, with the consent and concurrence of counsel for the appellees, respectfully moves the court to advance the above-entitled causes for hearing at the earliest day which the court may deem convenient for the purpose; and in support of said motion respectfully submits the following considerations:

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These causes are all appeals from final decrees of the court of appeals of the District of Columbia, dismissing bills praying that the complainants might be declared to be entitled to have their respective publications received and transmitted as mailable matter of the second class and that the Postmaster-General be enjoined from refusing so to receive and transmit them.

Two main points common to the three cases are:

First. Whether a finding of fact by the Postmaster-General that publications offered for transmission at the second-class rates of postage are not periodical publications chargeable at that rate, but books, chargeable at the third-class rate, can be reviewed by the supreme court of the District of Columbia upon a bill for an injunction.

Second. Whether the Postmaster-General, for the time being, is precluded from determining the real character of mail matter currently offered for transmission by reason of the receipt, by a former Postmaster-General, of matter of the same or similar character.

The final and authoritative determination of these questions is of vital and pressing importance to the daily administration of the Post-Office Department. In that Department findings of the same general nature as those challenged in these cases are required to be made to the number of five or six thousand annually. It is, therefore, most essential that the Post-Office Department

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should not be left in doubt as to the scope and extent of its duty and function in the premises.

Although the interests directly involved in the cases at bar are by no means inconsiderable in themselves, the cases derive their chief importance from the fact that they will doubtless be controlling upon a whole class, including a large number of cases now pending in the supreme court of the District of Columbia and a still larger number awaiting their determination.

It is estimated that the postal revenues affected by this litigation amount to several million dollars per year. It would, therefore, be in the interest not only of the United States, but of the appellants and all other publishers in a like situation, that there should be as speedy a determination of the matter as possible.

For these reasons it is respectfully suggested that the court will advance the causes for hearing at the earliest convenient day.

HENRY M. HOYT,
Solicitor-General.

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FEB 29 1904
JAMES H. MCKENNEY
Clerk.

Supreme Court of the United States

OCTOBER TERM, 1903

No. 372

HENRY O. HOUGHTON, Trustee, GEORGE H. MIFFLIN, J. MURRAY KAY, et al., Appellants

vs.

HENRY C. PAYNE, Postmaster-General

Brief for Appellants

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Supreme Court of the United States.

No. 372.

HENRY O. HOUGHTON, *Trustee*, GEORGE H. MIFFLIN, J. MURRAY KAY, ET AL., *Appellants*,

vs.

HENRY C. PAYNE, *Postmaster-General.*

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

THE question involved is whether certain "periodical publications" published by the appellants, and called "Riverside Literature Series," are entitled to be carried in the mails as mailable matter of the second class.

The case was heard on Bill and Answer in the Supreme Court of the District of Columbia, and on inspection by the Court of certain publications of the appellants which by stipulation (Record, page 12) were admitted for inspection. On March 10, 1903, a final decree was made by that Court, by which it was adjudged that complainants (appellants) were entitled to have their publications entitled "Riverside Literature Series" received and transmitted through the mails as mailable "matter of the second class."

On appeal to the Court of Appeals of the District of Columbia, that Court, on June 5, 1903, reversed the judgment of the lower court under a decree remanding the cause, with directions to dismiss the bill. The case is here on appeal from that decree.

BRIEF OF THE ARGUMENT.

The provisions of the statutes, the construction of which is presented, are as follows: —

Supplement to Rev. St. Vol. 1, page 454. Act of March 3, 1879, ch. 180.

"SEC. 7. That mailable matter shall be divided into four classes: —

First, written matter;

Second, periodical publications;

Third, miscellaneous printed matter;

Fourth, merchandise.

"SEC. 8. Mailable matter of the first class shall embrace letters, postal cards, and all matters wholly or partly in writing, except as hereinafter provided.

"SEC. 10. That mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within the conditions named in sections 12 and 14.

"SEC. 12. That matter of the second class may be examined at the office of mailing, and if found to contain matter which is subject to a higher rate of postage, such matter shall be charged with postage at the rate to which the inclosed matter is subject;

"Provided, That nothing herein contained shall be so construed as to prohibit the insertion in periodicals of advertisements attached permanently to the same.

"SEC. 14. That the conditions upon which a publication shall be admitted to the second class are as follows: —

"*First.* It must regularly be issued at stated intervals, as frequently as four times a year, and bear date of issue, and be numbered consecutively.

"*Second.* It must be issued from a known office of publication.

"*Third.* It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.

"*Fourth.* It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers;

"Provided, however, That nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.

"SEC. 17. That mail matter of the third class shall embrace books, transient newspapers, and periodicals, circulars, and other matter wholly in print (not included in section 12), proof-sheets, corrected proof-sheets, and manuscript copy accompanying the same, and postage shall be paid at the rate of one cent for each two ounces or fractional part thereof, and shall fully be prepaid by postage stamps affixed to said matter."

The rate of postage for second-class matter was fixed by this Act at two cents a pound or a fraction thereof, and was by Act of March 3, 1885 (23 St. 385), reduced one half, to one cent a pound or a fraction thereof.

Apparently, soon after this reduction in rate was made, the publishing firm of Houghton, Mifflin & Co., of Boston, conceived the idea that if a series of periodical publications, devoted to the publication of the best examples in prose and poetry of English literature, was cheaply and well printed by them and issued in compliance with the provisions of the Statute of 1879, it could, under the reduced rates for such publications provided in the Statute of 1885, be placed in the hands of subscribers at a cheap price, but with a margin of profit, as a mercantile venture.

Horace E. Scudder, a man of well-known reputation as a literary editor, was made supervising editor.

A sufficient number of subscribers was obtained and the enterprise was started by the publication of the first number on March 17, 1886.

The series was published weekly at a quarterly subscription of $1.60 until July, when it was changed to monthly, at yearly subscription of $1 25.

In 1889 it was changed to quarterly, with yearly subscription of fifty cents. In 1894 it was changed to semi-monthly, with yearly subscription of $2.50 until May 4, 1895, when subscription became $5 and continued until 1897, when the issue was changed again to monthly, with yearly subscription of $1.35. In 1900 it was again changed to quarterly, with yearly subscription of fifty cents.

At its inception and at each change of periodicity an examination was had by the Post-Office Department and a determination was made by the then Postmaster-General that the publications complied with the require ments of the Statute relating to mailable matter of the second class, and for sixteen years previous to the filing of this bill it has been so classified and carried in the mails.

The publications themselves are devoted to that sort of literature which is of the greatest use in the public and private schools of the United States.

The material, as inspection will disclose, has been most carefully selected by the general editor.

The different numbers have been specially edited, either by him or by some one selected by him, and provided with biographical sketches, introductions, notes, vocabularies, maps, and illustrations, and constitute an educational periodical of the very highest class.

The editorial work done on the series, consisting of such careful selection of material and such careful preparation of new auxiliary matter, has rendered possible the immense circulation which never could have been secured for mere reprints.

FACTS STATED IN THE BILL.

The facts stated in the bill, none of which are denied by the answer, show that the appellants, a publishing firm of Boston, Mass., owners of the "Riverside Press" at Cambridge, and doing business under the name of Houghton, Mifflin and Company, March 17, 1886, began and have continued to the present time the publication of a series of periodical publications known as "Riverside Literature Series."

That these publications are regularly issued at stated intervals as frequently as four times a year, bear date of issue, are numbered consecutively, and are issued from a known office of publication. That these publications are formed of printed paper sheets, without board, cloth, leather, or other substantial binding such as distinguish printed books for preservation from periodical publications.

That they are devoted to literature, have a legitimate list of subscribers, and are not designed primarily for advertising purposes or for free circulation at nominal rates.

That since March 17, 1886, for a period of more than sixteen years, these publications have been entered and admitted by successive Postmaster-Generals of the United States as mailable matter of the second class, the last certificate being made at Boston, September 15, 1900 (Record, page 3).

That on April 4, 1902, the appellants were notified to show cause why these publications —

"should not be denied second-class rates of postage under provi-
"sions of sec. 276, Postal Laws and Regulations (a copy of which is
"inclosed), on the ground that your publication has the characteris-
"tics of books."

That argument and evidence that these publications should not be denied second-class rates on account of their having the characteristics of books were submitted to the Third Assistant Postmaster-General, and on May 5, 1902, they were notified that the certificate of entry as second-class matter was canceled for the reason, —

"failure to establish that your publication comes within the pro-

"visions of the postal laws and regulations for acceptance in the "mails as second-class matter."

That the appellants were then bound under existing contracts to supply upwards of two million of these publications at a price based upon the postage rates chargeable upon them by the decisions of the Postmaster-General and his predecessors in office in regard to these particular publications, extending over an unbroken period of sixteen years, and the summary action then threatened to be taken by the Postmaster-General would have exposed them to great pecuniary loss and damage.

The Answer does not deny any of the facts set forth in the Bill but sets up as defense to the Bill, —

(1) That these publications do not constitute a periodical publication within the intent and meaning of the Statute defining the classes of mailable matter, and that although they comply with the external characteristics and conditions of the second-class mail matter, nevertheless, internally and in substance they have not the characteristics of second-class matter, but have the characteristics of books, and are, in fact, books.

(2) That whether they do comply with the conditions and requisites for admission is a question wholly within the competence and jurisdiction of the Postmaster-General, the determination of which is within the judgment and discretion of the Postmaster-General for the time being, and is not subject to review by the Court.

DISCRETION OF THE POSTMASTER-GENERAL.

In the case of Payne *vs.* National Publishing Co., 20 Appeals D. C. 581, the Court of Appeals said on this question : —

"It is very clear that the Congress of the United States has not "committed to the Postmaster-General, or to any one else, the mat-"ter of determining what should be carried in the mails as second-"class matter, and what as matter of the third class. It has re-"served the power exclusively to itself. It has itself made the classi-"fication, and it is not competent for the Postmaster-General to add "anything to the Statute or to take anything from it. It may be even "that the privileges of the mails had been greatly abused by the in-"troduction into them of mail matter of the second class which was "never anticipated by Congress. . . . The Postmaster-Generals who "for many years have been appealing to Congress for some remedy "for what they designate as an abuse to the second-class mail-matter

"system, seem also to have been of opinion that they were without "authority to remedy the evil by a postal regulation. It is unnecessary "for us, in the present case, to consider how far their action and "their view and construction of the law are binding, if at all, upon "their successors. But even if we assume that the matter now comes "up for consideration for the first time, and that the Postmaster-Gen- "eral is now for the first time called on to make regulations to carry "the Statute into effect, we are clearly of opinion that the postal "regulation of July 17, 1901, so far as it assumes to add to the re- "quirements of the Statute in regard to second-class mail matter, is "in excess of his authority, and of no validity in law."

Congress has given to the heads of departments authority to prescribe regulations, not inconsistent with law, for the government of his department (R. S. sec. 161), and it has in many instances conferred upon them power to hear and determine certain questions arising in their departments, but such powers have always been conferred by special statutes, as, for example, by sec. 3909, R. S., the Postmaster-General is authorized to make regulations for the affidavit to be taken by the publishers of any newspaper or periodical which may be sent to regular subscribers, without prepayment of postage at the mailing-office. By sec. 3907, R. S., Congress provided for the carriage of newspapers issued less frequently than once a week, and by sec. 3932, R. S., authorized regulations for registering letters; by sec. 3936 it authorized regulations for dead letters, and by sec. 406, R. S., for disposing of uncalled-for printed matter.

Now if the Postmaster-General possessed under the law the large general powers here claimed for him, it is inexplicable that it should have been needful or proper to provide by special statute for these petty details of his department. It is manifest from the Statute itself that Congress did not confer on the Postmaster-General the power of affecting by regulations, to any extent, the classification which it had made with unusual regard to minute details, of the mailable matter. In hardly any other case has Congress gone so minutely into details as in the Act of March 3, 1879, which defines the features and characteristics of the four several classes into which mailable matter is divided, and having gone with such particularity into the details of the subject it is absurd to suppose that it has intended to leave to the Postmaster-General the discretionary power of disturbing or altering the plan so carefully prepared by establishing regulations, or reading into the Statute provisions which defeat the Statute.

Several Postmaster-Generals have strongly advised the amendment of

existing laws defining second-class matter so as to exclude publications like the "Riverside Literature Series" from the description of mailable matter of the second class, and require them to pay postage as third-class matter, and the subject has been repeatedly before Congress.

Feb. 2, 1888, the following bill was before the House of Representatives: —

A bill (H. R. 4910) to amend sec. 14 of the Act approved March 3, 1879, — "entitled 'An Act making appropriations for the service of "the Post-Office Department for the fiscal year ending June 30, 1880, "and for other purposes,'" and relating to second-class matter.

"Be it enacted by the Senate and House of Representatives of the "United States of America in Congress assembled, that the four-"teenth section of the Act approved March 3, 1879, entitled 'An Act "making appropriations for the service of the Post-Office Department "for the fiscal year ending June 30, 1880, and for other purposes,' be "and the same is hereby amended by adding to the proviso thereto "and to the end of said section the following words, to wit, — 'and "that no publications that are books or reprints of books, whether "they be issued complete or in parts, bound or unbound, or in series, "or whether sold by subscription or otherwise, should be admitted to "the mails as second-class matter.'"

In debate on this proposed amendment Mr. Cannon (the present Speaker of the House of Representatives) said: —

"Before speaking on the merits of this bill, I wish to say to the "gentleman from Georgia, that, according to my recollection, by legis-"lation advisedly had, prior to 1879, while I was a member of the "Committee on the Post-Office and Post-Roads, this class of litera-"ture was allowed to pass through the mails. The policy of that "legislation being to encourage the dissemination of sound and de-"sirable reading-matter among the masses of the people of the coun-"try at cheap rates, both as to the cost of the books themselves and "as to the postage. The question was discussed, unless my memory "greatly misleads me, and the legislation was advisedly had. Under this "legislation the best classes of literature, for instance, the Waverley "Novels, Dickens's works, and the new translation of the Bible, have "been sent by publishing houses unbound, stitched, so that they could "be sold to the people at ten cents a volume. As a consequence of "this, you may now find in the homes of our farmers and laboring "men throughout the length and breadth of the country in this cheap

"form, issued at ten cents per volume, a class of literature to which, "prior to the adoption of this policy, some people in very good cir- "cumstances could scarcely have access."

Cong. Rec. vol. 19, p. 911.

After debate the bill passed the House.

In the Senate it was referred to the Senate Committee on Post-Office and Post-Roads and never became a law.

April 24, 1894, the following amendment to the Post-Office Appropriation Bill was introduced in the House of Representatives: —

"SEC. 4. That all publications purporting to be issued periodically "and to subscribers, but which are merely books or reprints of books, "whether they be issued complete or in parts, whether they be bound "or unbound, or whether they be sold by subscription or otherwise, "when offered for transmission by mail shall be subject to postage at "the rate prescribed for third-class matter."

After debate the amendment was rejected.

Cong. Rec. vol. 26, part 5, p. 4050.

Jan. 7, 1897, the Senate received from the House of Representatives a bill, accompanying H. R. 4566, known as the "Loud Bill," to amend the postal laws relating to second-class mail matter. It was referred to the Committee on Post-Offices and Post-Roads, and an extended hearing was had.

The published report of the Committee, 54th Congress, 2d Session, Senate Report No. 1517, with the notes of the hearing, covering over two hundred printed pages, show that this very "Riverside Literature Series" was produced before the Committee and considered by it, and the objection was then made that these publications were merely books and should be carried only at third-class rates.

The Committee reported in favor of a bill amending the law by a proviso, —

"That nothing herein contained shall be so construed as to admit "to the second-class rate publications purporting to be issued period- "ically and to subscribers, but which are merely books or reprints of "books, whether they be issued complete or in parts, whether they "be bound or unbound."

The result was that Congress, having all this matter before it, being fully advised of every fact and view that had been presented to the Com-

mittee, refused to amend the Act of March 3, 1879, as recommended by the Committee.

It was never claimed that the Postmaster-General had the power, and no Postmaster-General ever undertook to add anything to the Statute, or to take anything away from it until July 17, 1901, after the defeat of the Loud Bill, when the following regulation was passed: —

"SEC. 276. Postal Laws and Regulations, Edition of 1893 is "hereby amended to read as follows: —

"SEC. 276. General Definition. Mailable matter of the second "class shall embrace all newspapers, and other periodical publications "which are issued at stated intervals, and as frequently as four times "a year, and are within the conditions named in sections 12 and 14 "(Act of March 3, 1879, sec. 10, 20 Stats. 359). The sections referred "to are 293 and 277. Second-class matter above described is of two "kinds: (1) That sent by other than publishers or news agents (sec. "299). (2) That sent by other than publishers or news agents (sec. "302). 'Periodical publications' herein referred to are held not to "include those having the characteristics of books, but only such as "consist of current news or miscellaneous literary matter, or both (not "excluding advertising), and conform to the statutory characteristics "of second-class matter.

"CH. EMORY SMITH,

"Postmaster-General."

The notice served on appellants to show cause why their publication, the "Riverside Literature Series," should not be denied second-class rates of postage under the provisions of sec. 276, Postal Laws and Regulations, did not assign or charge any violation of the statute law on the part of the appellants, but that their publications had the characteristics of books.

This postal regulation under which it was sought to exclude these publications is clearly in excess of the Statute. There is no such condition or requirement attached to mailable matter of the second class, that it shall not have the characteristics of books.

The regulation itself has been declared invalid by the Court of Appeals.

Payne *vs.* Nat. Rwy. Pub. Co., 20 App. D. C. 581.

IT IS NOT SOUGHT BY THIS BILL TO CONTROL THE JUDGMENT OF THE POSTMASTER-GENERAL IN ANY MATTER CALLING FOR THE EXERCISE OF JUDGMENT UNDER THE STATUTES DEFINING "PERIODICAL PUBLICATIONS."

No facts relating to the definition of "periodical publications," as given by the Statute, are in dispute.

It is admitted in regard to these publications that —

(1) They are regularly issued quarterly, bear date of issue, and are numbered consecutively;

(2) from a known office of publication;

(3) are formed of printed paper sheets without board, cloth, leather, or other substantial binding, such as distinguish books for preservation from periodical publications;

(4) are devoted to literature, have a legitimate list of subscribers, and are not designed primarily for advertising purposes, or for free circulation, or at nominal rates;

(5) that their character has remained unchanged from time of first admission to filing of the Bill.

Since the final hearing on the Bill a claim has been made that they are not "devoted to literature" because they are literature.

The allegation of the Bill that they are devoted to literature is not denied by the Answer, and no intimation was ever made that such a distinction was claimed to exist until the argument upon appeal from the decision of Justice Hagner.

It is submitted that it cannot be said with any fair use of language that publications which embrace the collection and publication, with editorial note and comment, of the best examples of literature, are not devoted to literature.

Indeed, the point would seem almost too trivial for serious comment, had it not been given weight in the opinion of the Court of Appeals.

No fact necessary to be determined by the Postmaster-General is undetermined and there is nothing upon which judgment or discretion, so far as it has been granted to the Postmaster-General, remains to be exercised.

The determination of the Postmaster-General that these admitted facts do authorize their exclusion is a mistake of law.

"CHARACTERISTICS OF BOOKS."

Every publication consisting of printed leaves bound together is a book.

The judgment of the Court of Appeals appears to rest altogether on the view that the publications called the "Riverside Literature Series"

are "books," and for that reason alone are not within the class which, under the Acts of Congress, is entitled to be carried in the mails as second-class matter. Referring to those publications, the opinion inquires (Record, p. 30),—

"do they constitute a periodical publication, and become mailable "matter of the second class as defined in sections 10 and 14? We "think that there is but one reasonable answer to this question and "that has been given by the Postmaster-General. Henry Esmond, "when given to the world by the genius of Thackeray, in 1852, and "whether issued by the publishers in paper covers, or with board, "cloth, leather, or other substantial binding, was a book. Republished "singly, at any time, since the enactment of the present postal law, "and mailed, either bound or unbound, it has been, and is now, un-"questionably subject to postage as matter of the third class. Does "it become any the less a book when, there being no protecting "copyright, it may be republished verbatim, under its original title, "with the addition of a number of a named series, consisting of books "by other authors numbered consecutively, and issued at stated pe-"riods, not less than four times a year? Can the well-known book "lose its identity and become completely merged in a periodical "publication through the adoption and imprint of these additions? "Surely Congress could have contemplated no such possibility when "it undertook the complete classification of mail matter, putting books "in one class, and periodical publications in another."

This view adopts in express terms the ground taken by the Postmaster-General, in the notice of April 4, 1902, given to the appellants, through the Postmaster at Boston (Record, p. 3), that these publications would be denied second-class rates of postage "*on the ground that your publication has the characteristics of books.*"

An intelligent regard to the language employed in the Statutes, as well as to the manifest purpose which controlled Congress in this legislation, show very clearly that Congress has not, by expression or reasonable implication, denied to "books," or to publications having "the characteristics of books," the privileges of mailable matter of the second class.

The Statute itself is its safest and best interpreter. Where the meaning of its language is clear and unambiguous no rules of construction need be applied, the words speak for themselves. Where the legislative intent is manifest, the Act must be interpreted according to that intent. All technical rules of construction, or force of particular terms, must yield to the clear expression of the will of the legislature. If any words in the statute are doubtful or obscure they must be inter-

preted in the light of the manifest intention of the legislature. Where the meaning of the statute is doubtful, the reason and purpose of it should be considered.

Statutes should be so construed, if practicable, that one section will not defeat or destroy another, but explain and support it. They should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.

What was the intent and purpose of Congress as manifested by the Act of March 3, 1879, and its subsequent amendments (1 Suppl't R. S. 454, and 2 Suppl't R. S. pp. 196, 1444)?

Prior to the Act of March 3, 1879, the legislation of Congress as to mail matter was as follows: —

Statute 1845, ch. 43, sec. 16, defines mailable matter to mean —

"all letters and newspapers and all magazines and pamphlets periodically published, or which may be published in regular series, or in successive numbers, under the same title, though at irregular intervals, and all other written or printed matter whereof each copy or number shall not exceed eight ounces in weight, except bank-notes, without written letters accompanying them; but bound books of any size shall not be held to be included within the meaning of these terms."

Statute 1852, sec. 2, —

"Books bound or unbound, not weighing over four pounds, shall be deemed mailable matter."

Statute 1863, ch. 71, divided mailable matter into three classes: —

First. Letters.

Second. Regular printed matter.

Third. Miscellaneous matter.

Sec. 20 provided, —

"that the first class embraces all correspondence wholly or partly in writing except that mentioned in the third class. The second class embraces all mailable matter exclusively in print and regularly issued at stated periods without addition by writing, mark, or sign. The third class embraces all other matter which is or may be hereafter by law declared mailable; embracing all pamphlets, occasional publications, books, book manuscripts, and proof-sheets."

Statute 1872, ch. 335, contains an extended revision of the Statutes relating to the Postal Service, which was substantially reënacted in the Revised Statutes, sections 3875 *et seq.*

By Revised Statutes, sec. 3877 (Stat. 1872, ch. 335, sec. 132, re-enacted without change), it was provided that —

"mailable matter of the second class shall embrace all matter "exclusively in print and regularly issued at stated periods, from a "known office of publication, without addition by writing, mark, or "sign."

Here no reference is made to the subject-matter of the publication. All matter not actually prohibited as injurious to morals or injurious to society was admitted, if the conditions prescribed were complied with.

By the Act of March 3, 1879, a new and distinct purpose and object become manifest, the character and tendency of the subject-matter of the publication become an essential condition to its admission as second-class matter. The Act provides substantially as follows: —

SEC. 10. That mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within the conditions named in sections 12 and 14.

SEC. 12 provides for the examination of matter of the second class at the office of mailing.

SEC. 14. That the conditions upon which a publication shall be admitted to the second class are as follows, viz.: —

First. It must be regularly issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.

Second. It must be issued from a known office of publication.

Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish *printed books for preservation from periodical publications.*

Fourth. It must be originated and published for the dissemination of information of a public character or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers.

Of these conditions, performance, by these appellants, of the First, Second, and part of the Fourth, is not questioned, but as to the Third and part of the Fourth, it is contended that the "Riverside Literature Series," published by appellants, from an actual inspection of specimens produced in court, does not come within the beneficent protection of the Third condition because they are "books," and are under grave suspicion of ineligibility under the Fourth condition, because they are not "devoted to literature," but are literature themselves, the latter already having been referred to in this brief. It cannot escape notice that the Third condition does not prescribe features by which books, or even printed books, may be distinguished from periodical publications, but the

discriminating language is "such as distinguish printed books *for pre-* "*servation* from periodical publications."

In the opinion of the Court of Appeals (Record, p. 31), this language of the Statute is disposed of as follows: —

> "It is to be observed, also, that the provisions of section 14 are not "descriptive of the periodical publications named in section 10, but "express limitations upon the admission of such publications to car- "riage as second-class matter, under the head of conditions to which "they must conform before the privilege can be enjoyed. One does "not look to them to determine what is a periodical publication, but "to ascertain whether, being such a publication as is embraced by "section 10, it also answers the conditions imposed. Viewed in this "light there is no substantial weight in the argument based on the "concluding words of the third condition, that relates to binding, "namely, 'such as distinguish printed books for preservation from "'periodical publications.' These words are to some extent confusing, "but it would do violence to approved rules of construction to give "them the effect of controlling the meaning of periodical publications. "The words are apparently superfluous, and if used with any purpose "it would seem to be rather to emphasize the limitation of unbound "periodicals."

Of course, if words and even entire clauses are to be wrested from the body of the text of a statute, no weight can be given to an argument based upon the words so eliminated, but we are aware of no rules of construction, approved or otherwise, which warrant such liberties with a statute. The words of the Statute which are so rudely discarded as "superfluous" seem rather to have been employed with intelligent discrimination, and to have an important function assigned to them of excluding the very conclusion which the learned Court of Appeals has been enabled to reach only by this drastic Cæsarian operation.

We do not know where the rules of construction which warrant this method of construction are to be found, or by whom these rules have been "approved," but we do find that this Court has recognized and enounced rules of quite different import.

In Platt *vs.* Union Pacific R. R. Co., 99 U. S. 58, this Court said: —

> "But the admitted rules of statutory construction declare that a "legislature is presumed to have used no superfluous words. Courts "are to accord a meaning, if possible, to every word in a statute. In "Commonwealth *vs.* Alger, 7 Cushing, 53–89, it was said that in put- "ting a construction upon any statute every part must be regarded, "and it must be so expounded, if practicable, as to give some effect "to every part of it. So in People *vs.* Burns, 5 Mich. 114, it was held

"that some meaning, if possible, must be given to every word in a "statute, and that where a given construction would make a word "redundant it was reason for rejecting it."

The Statute defines second-class matter only by a category of the features which distinguish it. Section 10 provides that "mailable matter "of the second class shall embrace all newspapers and other periodical "publications which," etc. Section 14 recites the conditions on which a publication shall be admitted to the second class. That is, that while newspapers and periodical publications are embraced in the second class, yet these will be admitted only on compliance with the conditions prescribed in section 14.

We are concerned here with the inquiry — not what is a periodical publication, or what is a book, but What is the publication for which provision is made by sections 10 and 14 of this Act? Certain badges or earmarks are given by which it may be distinguished, and the Statute describes these generally, as features which "distinguish printed books for preservation from periodical publications." A distinction is plainly recognized here between two classes of books, namely, books for preservation and books not for preservation. The first class is excluded from the second-class mail matter. The second class *is included within it.* So it would seem that because a publication is a *book* is not, of itself, enough to exclude it from the second-class mail matter. It must be a "*book for preservation.*" Reference is here had to our common experience. We understand and recognize as books for preservation those books the paper and binding of which is adapted to preserve them on the shelves of our libraries. They are not what are known as "stage-coach" editions, with which we beguile the tedious hours of a journey, and then give or cast them away. The subject-matter of the book has nothing to do with its classification as a book for preservation, or not for preservation. The gravest treatises on historical, philosophical, and scientific subjects have been published in the form of books *not for preservation.* The Reports of the decisions of the Supreme Court of the United States are published semi-monthly on flimsy paper, in paper binding. On each copy is printed the words, "For temporary use, not to be bound." The same Reports are printed from the same forms, on heavy paper, and bound in calf or sheep. The former are books not for preservation, while the latter are exactly the same books, but for preservation.

It would seem to be too plain for argument, then, that the words employed in the Statute, "such as distinguish printed books for preservation from periodical publications," are neither confusing nor superflu-

ous, but that they are necessary to a clear apprehension of the intention of Congress and of the means provided for effectuating that intention.

The Court of Appeals in its opinion (Record, p. 30) refers to "Henry Esmond" and Plutarch's "Life of Alexander," and asks if these classic stories can be degraded and transformed into mere periodical publications by being bound in paper covers, issued at stated intervals, bearing a date of issue, and numbered consecutively.

We answer that they can, and that this was the controlling beneficent purpose and intent of Congress in the Act of March 3, 1879, and experience has abundantly vindicated the wise charity of the Act. Millions of cheap publications, such as those issued from the Riverside Press, of the soundest and purest literature of our English tongue, have by this means been sown broadcast over the land, and brought within the reach of the poorest and humblest of our people. The civilizing influences thus exerted have been of incalculable value in the diffusion of knowledge, the elevation of morals, the refinement of sentiment and thought and the formation of good and noble characters, and these were the ends which Congress had in view in facilitating the distribution of such publications by placing them in the mails as second-class matter to be carried at the rate of one cent per pound. If Congress contemplated, as we suppose it did, in reducing the rate of postage on this class of publications, a measure of educational benefit resulting therefrom, it must be presumed to have intended that such benefit should be as extensive as the means employed would allow, and that literature, art and science, and special industry, applied as well as theoretical, should be given to the people.

This broad and beneficent purpose of Congress, expressed in the Act of March 3, 1879, is confirmed and accentuated by the Act of July 16, 1894 (28 Stat. 104, 2 Suppl't R. S. 196), in which it is provided, —

"That from and after the passage of this Act, all periodical publi-
"cations issued from a known place of publication, at stated intervals,
"and as frequently as four times a year, by or under the auspices of
"a benevolent or fraternal society or order, organized under the lodge
"system, and having a bona fide membership of not less than one
"thousand persons, or by a regularly incorporated institute of learn-
"ing, or by or under the auspices of a trades-union, and all publica-
"tions of strictly professional, literary, historical, or scientific soci-
"eties, including the bulletins issued by the State boards of health,
"shall be admitted to the mails as second-class matter, and the post-
"age thereon shall be the same as on other second-class matter, and
"no more," with the proviso "that they shall be formed of printed
"paper sheets without board, cloth, leather, or other substantial bind-

"ing such as distinguish printed books for preservation from periodical "publications."

All "periodical publications" must have some characteristics of books in the nature of things. A book is merely a collection of written or printed sheets fastened or bound together.

It is only when a periodical publication, which conforms with all other requirements of the statute, is bound in board, cloth, leather, or other substantial binding, such as distinguishes printed books for preservation from periodical publications, that it has a characteristic of books which prohibits its admission as mailable matter of the second class.

PERIODICAL PUBLICATIONS.

It is now claimed that the term "periodical publication" is the equivalent of the word "periodical," and that the word "periodical" is restricted to a definite type or class of publications, the mean or common term of which is "magazines."

If this claim is correct it follows, that, notwithstanding the division of mailable matter as particularly specified by

SEC. 7. *First:* Written matter.
Second: *Periodical publications.*
Third: Miscellaneous printed matter;

and notwithstanding the statement in

SEC. 10. Mailable matter of the second class shall embrace all newspapers and other *periodical publications* which are issued at stated intervals, as frequently as four times a year, and are within the conditions named in sections 12 and 14;

and notwithstanding the statement in section 14 of the conditions upon which *a publication* shall be admitted to the second class;

and notwithstanding the distinction in the same section which distinguishes printed books for preservation from *periodical publications;*

and notwithstanding the proviso that nothing shall be construed to admit to the second class *regular publications* designed primarily for advertising, etc.;

it must be held that the definition of the subject named, viz., periodical publications, is not a definition of that subject, but of another and more restricted subject.

Mr. Justice Shepard in the opinion of the Court of Appeals (Record, p. 30) states as "matter of common knowledge when this statute of 1879 was enacted" certain facts in regard to some periodical publica-

tions known as magazines and reviews which he declares must be held to have been in the minds of Congress, as restricting the meaning of the term, and wholly omits to state other matters of equally common knowledge, — that periodical publications containing but one complete work in each issue had long been published and carried in the mails as periodicals, and that their periodical character had never been questioned so long as they were issued periodically; that when in 1877 Donnelly, Lloyd & Co., of Chicago, published a book entitled "Daniel Deronda" in a periodical publication entitled "The Lakeside Library," and the postmaster of Chicago questioned its right to be mailed at pound rates, Attorney-General Devens decided that it was a "periodical publication," and should be admitted as such if it complied with the law respecting "periodical publications."

15 Op. of Atty.-Gen. 346.

The argument of the Court of Appeals (Record, p. 31), that unless "periodical publications" is held to have this restricted signification it would result in the admission of foreign novels free, has no weight in view of the provisions of the Tariff Acts (see Acts of 1890, ch. 1244, par. 657 and 1894, ch. 349, par. 562) referring to the admission of newspapers and periodicals, "but the term 'periodical,' as herein used, "shall be understood to embrace only unbound or paper-covered publi- "cations containing current literature of the day and issued regularly "at stated periods as weekly, monthly, or quarterly."

Indeed the restricted magazine construction is entirely exploded by the opinion of the Court of Appeals in the case of Payne *vs.* Nat. Rwy. Pub. Co., 20 App. D. C. 581, for the Nat. Rwy. Guide, there held to be a periodical publication within the definition of the Statute, has none of the characteristics specially distinctive of magazines or reviews.

A LONG ESTABLISHED, UNIFORM CONSTRUCTION BY AN EXECUTIVE DEPARTMENT SHOULD NOT BE DISREGARDED WHERE PERSONS HAVE MADE CONTRACTS AND INCURRED LIABILITIES UPON THE FAITH OF SUCH CONSTRUCTION.

Where the language of an Act of Congress is so clear and explicit as not to be open to construction, its construction cannot be changed by the practice of the Department, however long continued; but if there is ambiguity or doubt as to the meaning of the Act, then such a practice, begun early and continued long, would be in the highest degree persuasive, if not absolutely controlling, in its effect: —

United States *vs.* Graham, 110 U. S. 219.
United States *vs.* Hill, 120 U. S. 169.
United States *vs.* Finnell, 185 U. S. 236, 244.

From the 17th of March, 1886, to 5th of May, 1902, a period of sixteen years, the appellants have sent these publications through the mails, after first obtaining a certificate from the Post-Office Department that it had been "determined by the Third Assistant Postmaster-"General to be a publication entitled to admission into the mails at "the pound rate of postage, and entry of it as such is accordingly made "upon the books of this office."

On the faith of this determination they had made contracts with their subscribers throughout the United States, on terms which were calculated and fixed on the "pound rate of postage." They had, during this period, largely increased the volume of their publications; had extended the field of their operations and multiplied their contracts, and to that extent had greatly enlarged their obligations. These are yet in binding force and operation, and must be met and fulfilled by them. The question is thus presented here: Has the present Postmaster-General the lawful power and right, by a different and novel construction of the Act, to deprive complainants of the right, so acquired, and entail upon them the vast pecuniary loss which must be consequent upon this capricious change of the law.

In United States *vs.* Alabama R. R. Co., 142 U. S. 621, the Supreme Court said: —

"We think the contemporaneous construction thus given by the "Executive Department of the Government, and continued for nine "years, through six different administrations of that Department — "a construction which though inconsistent with the literalism of the "Act, certainly consorts with the equities of the case — should be de-"cisive in this suit. It is a settled doctrine of this Court that in case "of ambiguity, the Judicial Department will lean in favor of a con-"struction given to a statute by the Department charged with the "execution of such statute, and if such construction be acted upon "for a number of years will look with disfavor upon any sudden "change, whereby parties who have contracted with the Government "upon the faith of such construction, may be prejudiced."

If the Court may take notice of the employment of capital in business without interference of the National Government, under its implied sanction it will certainly look with disfavor upon a change in the construction made by the officers charged with that duty and upon the express sanction of which third parties have acted and incurred large pecuniary liabilities.

Del Monte *vs.* Last Chance, 171 U. S. 55, 62.

ON THE ADMITTED FACTS THE ACTION OF THE POSTMASTER-GENERAL IS MANIFESTLY AN ATTEMPT TO PUT INTO THE BODY OF THE STATUTE A LIMITATION WHICH CONGRESS DID NOT THINK IT NECESSARY TO PRESCRIBE.

The object of the Postmaster-General can only be accomplished by an amendment of the law.

Morrill *vs.* Jones, 106 U. S. 466.

RIGHT OF THE COURT TO INTERVENE.

Courts will not intervene in cases that are pending in a Department awaiting the exercise of its administrative functions.

Johnson *vs.* Towsley, 13 Wallace, 86.

After a matter pending in a Department has been finally disposed of the Court may be invoked to inquire whether the outcome is in accordance with the laws of the United States.

Brown *vs.* Hitchcock, 173 U. S. 473, 477.

In matters which require judgment and consideration to be exercised by an executive officer of the government, or which are dependent on his discretion the Court will not interfere to control his action.

Carrick *vs.* Lamar, 116 U. S. 423, 426.

But in this class of cases as in all others there exists in courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that those officers have, by mistake of the law, given to one man the land which on the undisputed facts belongs to another, to give appropriate relief.

Moore *vs.* Robins, 96 U. S. 530, 535.

Where the conclusions of a Department have been reached from a misconstruction, by its officers, of the law applicable to the case before it, and it has thus denied to parties rights which, upon a correct construction, would have been conceded to them, then the courts can interfere and control its determination, so as to secure the just rights of parties injuriously affected.

Sandford *vs.* Sandford, 139 U. S. 642, 647.

The facts which are here admitted of record show that the case is one which by any construction of those facts does not warrant the exclusion of these publications from the privileges of second-class matter, and the determination of the Postmaster-General that these admitted

facts do authorize their exclusion is a mistake of law and courts must have power to grant relief. Otherwise the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual.

Although the Postmaster-General had jurisdiction over the subject-matter and it was his duty to decide whether, upon the facts, these publications were entitled to admission as mailable matter of the second class, yet such a decision being a legal error does not bind the courts.

Am. Sch. of Mag. Healing *vs.* McAnnulty, 187 U. S. 94, 109.

RESULT WHICH FOLLOWS IF IT IS HELD THAT WHETHER ON THE ADMITTED FACTS THESE PUBLICATIONS DO COMPLY WITH THE CONDITIONS AND REQUISITES FOR ADMISSION AS MAILABLE MATTER OF THE SECOND CLASS IS A QUESTION WHOLLY WITHIN THE COMPETENCE AND JURISDICTION OF THE POSTMASTER-GENERAL, THE DETERMINATION OF WHICH IS WITHIN THE JUDGMENT AND DISCRETION OF THE POSTMASTER-GENERAL FOR THE TIME BEING AND IS NOT SUBJECT TO REVIEW BY THE COURT.

Assuming, for the sake of argument, that the Postmaster-General was invested by law with the discretionary power of determining whether mail matter belonged to the one class rather than to another, and that his judgment, when announced, was binding on the parties, it appears as a fact in this record that the Postmaster-General has, as to the "Riverside Literature Series," exercised that discretion and announced his judgment, and that on the faith of that judgment these appellants have contracted large obligations and incurred heavy liabilities.

On full inspection of these publications the Post-Office official, empowered to act, gave the following certificate: —

"Post-Office at Boston, Sept. 15, 1900.

"I hereby certify that the 'Riverside Literature Series,' a quarterly published at this place, has been determined by the Third Assistant Postmaster-General to be a publication entitled to admission into the mails at the pound rate of postage, and entry of it as such is accordingly made upon the books of this office. Valid while the character of the publication remains unchanged, or until revoked.

GEORGE A. HIBBARD, Postmaster,
by C. C. MANSFIELD, Asst. P. M.

Here the fact is solemnly determined, that this publication is entitled

to admission into the mails as second-class matter, and this determination is formally certified.

This certificate is declared to be valid while the character of the publication remains unchanged, or until revoked. The character of the publication remains admittedly unchanged.

For what other cause may the certificate be revoked? For fraudulent abuse of the privilege, or such other cause as would warrant the forfeiture of a legal right. The opinion of the Court of Appeals (Record, p. 33) says, —

> "In conclusion it may be remarked, that the certificate relied on is "a mere license, and by its own express declaration continues until "revoked."

Certainly, and it might have been said, "continues only until revoked."

Does the Court mean that it may be revoked arbitrarily, capriciously, and without sufficient legal cause? That it was not a revocable license was distinctly held by the same Court six months before, in the Railway Publication case, in which that Court said: —

> "The citizen who desires to have his publication carried in the mails "of the United States, as second-class matter, and who has fully and "fairly complied with all the requirements of the Statute in regard "thereto, has acquired a positive legal right to have it so carried, and "his right will be enforced by the writ of mandamus."

One having a "positive legal right" cannot be deprived of it by a mere arbitrary revocation, and a "mere licensee" cannot resist revocation of his mere license by the writ of mandamus.

The words "until revoked" must be taken to mean revoked for legal cause.

On April 14, 1902, appellants were called (Record, page 3) "to show "cause why" their publication should not be denied second-class rates of postage "on the ground that your publication has the characteristics "of books."

But these publications had the same characteristics of books on Sept. 15, 1900, when adjudged to be entitled to admission into the mails, as second-class matter, which they had on May 5, 1902, when adjudged, upon the foregoing order to show cause, not entitled to such admission.

Both decisions were made upon the same state of facts.

If it was an act involving the exercise of judgment and discretion, to the extent that there is no power to control such discretion, however erroneous its exercise may seem to have been, then it was a judicial act.

Noble *vs.* Union River L. R. R., 147 U. S. 165, 170.

If the Postmaster-General had confided to him by law authority to be

exercised by him in his discretion, upon an examination of facts, of which he is made the judge, his decision upon these facts is absolutely conclusive as to their existence, and cannot be reversed by his successor or questioned by the courts.

United States *vs.* Wright, 11 Wallace, 648.

If the Postmaster-General acted in a judicial rather than a ministerial capacity in determining on May 5, 1902, that these publications did not fall within second-class matter, entitled to pound rate privileges, then he must have acted in a like capacity on Sept. 15, 1900, when he decided that they were in the second-class privileges, and it is not competent for him, any more than it would be for a court, to reverse and annul his previous final judgment on the same state of facts, it being one of the admitted facts that the character of the publication has remained unchanged.

If he is *judicial* for one purpose he is judicial for *all* in the same matter.

HOLMES CONRAD,
WILLIAM S. HALL.

APPELLANT'S

BRIEF

28123

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 373.

BATES AND GUILD COMPANY, *Appellant*,

vs.

HENRY C. PAYNE, *Postmaster-General, Appellee.*

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

THE question involved is whether certain "periodical publications" published by the appellant, and called "Masters in Music," are entitled to be carried in the mails as mailable matter of the second class.

The case was heard on Bill and Answer, in the Supreme Court of the District of Columbia, and on the inspection by the Court of certain of these publications of the appellant, which, by stipulation (Record, page 13), were admitted for inspection. On March 10, 1903, a final decree was made by that Court, by which it was adjudged that the complainant, who is appellant here, was entitled to have its said publications received and carried through the mails as "mailable matter of the second class."

On appeal to the Court of Appeals of the District of Columbia, that Court, on June 5, 1903, reversed the decree of the lower court, and remanded the cause, with directions to dismiss the Bill. The case is here on appeal from that decree.

BRIEF OF THE ARGUMENT.

This case was heard in both the lower courts, and will be heard in this Court, with the case of Houghton, Mifflin & Co. *vs.* Henry C. Payne, Postmaster-General, which involves the same questions of law,

and for that reason we adopt here the brief filed for the appellants in that case. The Bill in this case, as in that, charges full compliance by the complainant with all the requirements of the Statute as to second-class mail matter, and these charges are not denied in the Answer of the defendant.

The first of the publications of the "Masters in Music" was issued in January, 1903, and in that month application was duly made for the entry and admission of the publications, as mailable matter of the second class, at the Post-Office in the city of Boston, Mass., and was approved by the Postmaster at that office. On the 20th January, 1903, this appellant was notified by a letter dated the 17th January, 1903, from the Third Assistant Postmaster-General, addressed to the Postmaster at Boston, —

> "that admission to the second class of mail matter of the publica-
> "tion known as 'Masters in Music,' published in your city by Bates
> "and Guild Company, is denied, for the reason that the publication
> "has, under the Statute, the characteristics of third-class matter, and
> "not second-class matter (Act of March 3, 1879). It is composed
> "mainly of sheet-music. You will inform the publisher of this denial
> "of entry."

That this appellant was then liable, under existing contracts, to supply upwards of eighty thousand copies of these publications, at a price based upon the postage rates charged upon them as mailable matter of the second class.

This fact was charged in the Bill, and was not denied in the Answer of the defendant.

The Answer of the defendant, while not denying any of the allegations of fact made in the Bill, sets up, affirmatively, as grounds of defense, the following: —

(1) That in form, the publication has the characteristics of third-class matter, "in that it is a book." That in matter it "has not the char-
"acteristics of currency or miscellany common to newspapers and
"other periodical publications, that it relates to a single subject, and
"to a single individual" only introductory to its main contents, viz., sheet-music.

(2) That it is not a "periodical publication," because each publication is complete in itself, without relation or connection with those that precede or follow it.

(3) That it is not devoted to the "arts," within the meaning of the Act of March 3, 1879, for the reason that it is not a continuing permanent "periodical publication" within the accepted and statutory meaning of that term, the contents of which are devoted to the

arts and have the characteristics of miscellany and currency such as denote periodical publications and magazines in general, but that, save in the sense that the subject-matter of such publication is the art of music, wherein it differs in no sense or particular from any other collection of sheet-music, or of any other book relating to music, the said collection does not comply with the statutory requirements of sections 10 and 14 of the Act of March 3, 1879.

(4) That the Postmaster-General, "after an inquiry into the facts relevant and material to the inquiry, an examination of evidence, and a construction of law and application thereof to the facts, found and determined that the publications offered for transmission, not having the characteristics of second-class matter, were not entitled to admission to the mails at the second-class rates, and the application for that rate of postage was therefore denied, which said finding, determination, and decision involved the exercise of judgment and discretion on the part of this defendant, and for that reason is not subject to be reviewed by the courts."

The question which this Bill is brought to test is contained in the ruling of the Post-Office Department, "it is composed mainly of sheet-music" and for that reason "has under the Statute the characteristics of third-class matter and not second-class matter." (Record, p. 7.)

This is the only ruling which the Department has ever made in regard to these publications.

It never has been, and cannot be, truthfully denied that these publications are published as frequently as four times a year, bear date of issue, are numbered consecutively, and are issued from a known office of publication, and are formed of printed sheets without board, cloth, leather, or other substantial binding such as distinguish books for preservation from periodical publications, and that they are devoted to the art and science of music.

These facts the Post-Office Department never questioned, resting its decision on the ruling as given, "it is composed mainly of sheet-music."

The Answer seeks to avoid the decision of this question and to have the Bill dismissed on the highly technical allegation, —

"inasmuch as but one publication known to the defendant has been published under the name of 'Masters in Music,' the defendant is unable to admit that the said publications are published as frequently as four times a year, or bear date of issue, or are numbered consecutively, or are issued from the known office of publication of the complainant, or that said publications or each and every of them are formed of printed paper sheets without board, cloth,

"leather, or other substantial binding such as distinguish printed "books for preservation from periodical publications, or that said "publications or each or every of them are devoted to the art and "science of music." (Record, p. 6.)

To this technicality, which was never raised by the Department, the technical reply is made that as the case is heard on Bill and Answer, facts well alleged in the Bill and not denied or put in issue by the Answer shall be deemed to be admitted.

That all these facts are well alleged in the Bill and are not denied or put in issue by the Answer, that the allegation, "inasmuch, etc.," is at most a statement of a conclusion of law and is not an allegation denying or putting in issue the facts referred to which are well alleged in the Bill.

These questions of fact were never raised by the Post-Office Department, and it is confidently submitted that they are not raised by this Bill and Answer.

The questions presented in the several grounds of affirmative defense, as to the "Discretion of the Postmaster-General," "The Characteristics of Books," "Periodical Publications," and the "Rights of the Courts to Intervene," have been sufficiently discussed in the brief filed in the Houghton case, and need not be repeated here.

One principal feature distinguishes this case from the Houghton case. In the Houghton case, the publications had been formally declared by the Postmaster-General to be entitled to admission and carriage in the mails, as mail matter of the second class, and had been so carried for sixteen years before their classification was questioned and denied, while in this case, the publication entitled "Masters in Music," although approved by the Postmaster at Boston, and received by him as mail matter of the second class, was subsequently denied admission by the Postmaster-General, on the ground that "it has the characteristics of third-class matter and not second-class matter," within a few weeks after the first number had been received at the Boston post-office. This may be accepted as a denial, *in limine*, of its admissibility as second-class matter.

But it is obvious that this difference in the facts of the two cases can have no weight in the determination of the main question presented here for decision, for if this appellant has, as to its publications, complied with all the requirements of the Statute, entitling them to admission and carriage in the mails, as mail matter of the second class, their denial of such admission and carriage by the Postmaster-General

was as flagrant a violation of its legal rights, as was the exclusion of the publications of Houghton, Mifflin & Co., which had been admitted and carried for sixteen years.

The single question, then, to be determined, is, Does the publication, entitled "Masters in Music," upon the undisputed facts, fully and in all respects comply with the requirements of the Statute as to mail matter of the second class? The Bill of complainant charges that it does. It recites (Record, p. 2) all of those requirements, and charges specifically that "your Orator, in the publication and issue of these publications "has complied with all the terms, conditions, and requirements of the "laws of the United States relating to mailable matter of the second "class."

This specific charge of the Bill is not denied by the defendant in his Answer thereto, but indeed is practically admitted. The defendant being content to rest his defense on the general ground that "the pub- "lication has the characteristics of third-class matter, and not the charac- "teristics of second-class matter." Just as in the Houghton case, he rests his defense on the like general ground, that that publication has the characteristics of books.

The Statute, it will be observed, says nothing of "characteristics," either of books or second-class matter, or third-class matter, but it prescribes, with singular minuteness of detail, certain objective and subjective features which must concur in publications to entitle them to admission and carriage in the mails as matter of the second class.

The objective, or physical features are, that the publication must appear (1) to be issued regularly at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively. (2) It must be issued from a known office of publication. (3) It must be formed of printed sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books from periodical publications.

The subjective features are, that the publication must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers.

The Proviso is, that the foregoing shall not be construed so as to admit to the second-class rate regular publications designed primarily for advertising purposes or for free circulation, or for circulation at nominal rates.

Now it is apparent that the objective or physical features can be ascertained only by ocular demonstration, and this evokes "the exercise of judgment and discretion" only as that faculty is exercised in observing the tube of a thermometer or a barometer to ascertain the point at

which the mercury stands. The judicial officer who should "find, hold, and determine" that the mercury stood at 90°, when to the eyes of all observers it stood, in fact, at 40°, would insist in vain that his decision "is not subject to be reviewed by this honorable Court."

The subjective features call for the exercise of but little more of judicial and discretionary faculties. Whether a publication is designed and adapted "for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry," may be ascertained by a very casual glance at the contents.

The particular publication involved in this case — "Masters in Music" — is said, in the Answer of the defendant here (Record, p. 8), to be "designed to follow one another monthly, in such manner as to form a wholly disconnected and varied succession of distinct collections of sheet-music, prefaced by explanatory, biographical, critical, and bibliographical comment." Accepting this unfriendly description of the publication as a reasonably true description, we risk nothing in submitting the publication as one "devoted to literature, science, and art."

A periodical publication devoted to the art, science, and literature of Music, can hardly be expected to do more, for popular education at least, than present the great Masters in Music, either chronologically, or by their different schools, by giving specimens of their creations in "sheet-music," with explanatory, biographical, critical, and bibliographical comment.

Upon the facts, which are not denied, here is a periodical publication which contains, as inspection discloses, first, a biographical sketch of a certain composer of sufficient distinction to be designated a master or classic; second, a description of his art; third, notes explanatory and descriptive of selections from his works; fourth, selections of music from his works.

The separate pieces of music are selected in illustration of the text and notes, are only fragments or portions of the particular works of the composer from which they are selected, and derive their value as such illustrations in the connection in which they are printed, and not as independent pieces of sheet-music.

Each monthly issue is one of a series, each one to be devoted to a single composer, with a subscription covering a year's issue. Not only is each monthly publication a part of a continuous series, but each page is numbered continuously for index and reference.

In fact, it is difficult to see in what respects a publication of this character devoted to the Art of Music could be made to comply more completely and accurately with the letter and spirit of the Statute.

But, by stipulation of the parties, specimens of the publication have been, and will again be presented to the Court, who can then see how

far they come fairly and reasonably within the spirit, as well as the letter, of the law.

With great deference to the Court of Appeals, whose judgment we are here asking to have reviewed, as well as to our learned opponents of the Bar, we venture to submit that the erroneous view they have taken of this Act of Congress results from their failure to apply the true touchstone to discover its real significance, purpose, and intent. It was not, as they appear to think, an economic measure, to curtail and restrict the mail matter of the second class with a view to larger postal receipts, and a retrenchment of postal expenditures, but, on the contrary, it was intended to introduce an element hitherto unknown in postal legislation, to wit, the employment of the postal facilities as a means of the diffusion of useful knowledge, and of contributing to the growth of popular education. This would seem to be evident from the very objects specified in the terms of the Act. What has the postal economy of the Government to do with the dissemination of information of a public character, or with devotion to literature, science, art, or special industries? What connection can be supposed to exist between them? Why should Congress require that periodical publications devoted to these objects be carried in the mails at the rate of one cent per pound, while other publications devoted to other objects are required to pay eight cents per pound?

But the public records of recent Congressional proceedings cast a light on the subject which makes it well-nigh impossible to err in our judgment as to the purpose and intention of Congress.

February 2, 1888, a bill was before Congress to restrict the publications of this class, but failed to become a law. April 24, 1894, another amendment for this purpose was debated and rejected in the House of Representatives, and in January, 1897, the Loud Bill, so called, after debate, failed to become a law.

The policy of the Act of March 3, 1879, was adhered to, and on July 16, 1894 (28 St. 104), Congress greatly enlarged the class of publications to which the privileges of second-class mail matter was allowed.

The express refusal of Congress to adopt and enact as a law the provisions of these various bills was in effect a declaration by Congress of the purpose, meaning, and intent of the Act of March 3, 1879, which they sought to amend.

In Cope *vs.* Cope, 137 U. S. 682, 688, this Court said: "The several acts of Congress, dealing, as they do, with the same subject-matter, should

be construed, not only as expressing the intention of Congress at the dates the several acts were passed, but the later acts should also be regarded as legislative interpretations of the prior ones. United States *vs.* Freeman, 3 Howard, 564, Stockdale *vs.* Insurance Co., 20 Wall. 323."

HOLMES CONRAD,
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In the Supreme Court of the United States.

OCTOBER TERM, 1903.

HENRY O. HOUGHTON, TRUSTEE, ET AL., appellants, v. HENRY C. PAYNE, POSTMASTER-GENERAL, appellee. } No. 372.

BATES & GUILD COMPANY, APPELLANT, v. HENRY C. PAYNE, POSTMASTER-GENERAL, appellee. } No. 373.

ORMOND G. SMITH ET AL., APPELLANTS, v. HENRY C. PAYNE, POSTMASTER-GENERAL, appellee. } No. 481.

BRIEF FOR THE APPELLEE.

STATEMENT OF THE CASES.

These are all appeals from final decrees of the court of appeals of the District of Columbia, dismissing bills praying that the various complainants might be declared entitled to have their respective publications received and transmitted through the mails as mailable matter of the second

class; and that the Postmaster-General be perpetually enjoined from refusing to receive and transmit them at that rate.

The cases were all heard upon bill and answer. The essential facts of the three cases are the same. It is conceded by counsel for the appellants in the Smith case (No. 481) that it is controlled by the Houghton case (No. 372); the Bates and Guild case (No. 373) differs from the others only in a single particular which will be noticed hereafter.

THE HOUGHTON CASE.

Taking, then, the Houghton case as the type, we find that the facts conceded by the setting down of the cause upon bill and answer are as follows:

The complainants, copartners under the style of Houghton, Mifflin and Company, printers and publishers of books and periodicals, allege that since March 17, 1886, they have been and are now engaged in printing and publishing a series of periodical publications known and described as the "Riverside Literature Series." They aver that since that date these publications have been regularly issued at stated intervals as frequently as four times a year, have borne a date of issue and have been numbered consecutively, and been issued from the known office of publication of the complainants; that the publications have been formed of printed paper sheets without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical pub-

lications, and have been devoted to literature; that they have had a legitimate list of subscribers, and have not been designed primarily for advertising purposes or for free circulation or for circulation at nominal rates. Upon these allegations they aver that in respect of publication and issue the publications have complied with all the terms, conditions, and requirements of the laws of the United States relating to mailable matter of the second class.

That of these publications already issued, it is averred, Nos. 1–18 were originally issued weekly; subsequently they were issued monthly, until April, 1889, when they began to be issued quarterly. In April, 1894, another change was made, and the publications of this series appeared semi-monthly for a period of three years, when in May, 1897, they again became monthlies, and so remained until May, 1900, when they were again issued quarterly. From March 17, 1886, they had been recognized, entered, and admitted by the successive Postmasters-General of the United States as mailable matter of the second class and had been conveyed at the rates prescribed for such matter. And upon the change to a quarterly, on September 15, 1900, a certificate of entry to the pound or second-class rate of postage was issued, purporting upon its face to be "Valid while the character of the publication remains unchanged or until revoked."

On April 4, 1902, the publishers were cited to show cause why the "Riverside Literature Series" should not be denied second-class rates of postage, on the ground that they had "the characteristics of books."

Evidence and argument that these publications should not be denied the second-class rates of postage on account of their having the characteristics of books was submitted in compliance with said notice. (Transc., p. 4.) Thereafter, on May 5, 1902, the publishers were informed in writing that the evidence and argument to show why their publications should not be denied second-class rates on account of their having the characteristics of books having been duly submitted to the Third Assistant Postmaster-General, the certificate of entry giving permission to mail the "Riverside Literature Series" at second-class rates had been canceled and that postage on the series when offered for mailing in the future would have to be prepaid at the third-class rate.

Upon the request of the complainants for an extension of time, the date of exclusion from the second class was postponed until May 31, 1902, on which date the bill in this case was filed stating the facts above set forth.

The complainants further alleged that the cancellation of the certificate of entry giving permission to mail such publications at second-class rates on account of their having the characteristics of books was unlawful, and was a reversal of the

practice sanctioned by the Postmaster-General and his predecessors in office in regard to these particular publications, extending over an unbroken period of sixteen years, and that the exclusion of these publications from the mails as mailable matter of the second class would cause the complainants great pecuniary loss and damage.

The prayers of the bill are: *First*, that the complainants might be declared to be entitled to have these publications entered, received, and transmitted through the mails as mailable matter of the second class, as defined by the act of Congress approved March 3, 1879; *second*, that an injunction might be granted restraining the Postmaster-General from enforcing the cancellation of the certificate of entry of September 15, 1900, above mentioned, and requiring him to receive said publications and transmit the same through the mails as mailable matter of the second class; and, *third*, for general relief.

Two copies of the publications were filed as exhibits to the bill, and it is alleged that they are similar to each and every other of said publications.

A temporary restraining order having been issued upon a subsidiary prayer for that purpose, the Postmaster-General appeared and answered the bill at length. He denied specifically that the publications of the complainants, designated as the "Riverside Literature Series," constituted a periodical publication within the intent and meaning

of the statute of the United States defining the various classes of mailable matter. On the contrary, he averred that, although said publications are regularly issued at stated intervals from the known office of the complainants, and are formed of printed paper sheets without board, cloth, leather, or other substantial binding, and thus comply with the external characteristics and conditions of the second class of mailable matter, nevertheless, internally and in substance they have not the characteristics of said second class of mailable matter, but have all the characteristics of, and are in fact, books. (No. 372, *Houghton* v. *Payne*, Transcript, p. 8.)

He further set forth that said publications have not the characteristics of second-class mail matter in that they have no true relation one with another, so as to constitute them a periodical within the intent of the law, but

> Each publication, issue, or so-called number is in truth a separate reprint, unaltered and unabridged, of what previously has been published confessedly as a book or as a part of a book.

As an illustration of this, he averred that the complainants have been in the practice, whenever the reprint was of greater volume than usual, of calling such publication a double, triple, quadruple, or quintuple number, as the magnitude of the publication might require, and of charging therefor

twice, thrice, four, or five times the usual price, as the case might be.

In respect of the character and nature of these publications, he set forth the fact that the several reprints followed one another quarterly, without order or system, in such manner as to form a wholly disconnected and varied succession of distinct pieces of reading matter in biography, poetry, essays, literary and descriptive, natural history, and mythology, and that the only connection between the successive reprints consists in the mere fact that over the title of the publication or particular reprint is printed the words "Riverside Literature Series," and that such reprints are numbered successively.

As a further illustration of the true nature of the publications of which the "Riverside Literature Series" is composed, the Postmaster-General averred that the complainants had been in the practice of printing under that name so-called "extra" numbers, designated not by numbers but by letters of the alphabet, which extra numbers are of the same kind and nature and in all respects similar to the numbers published periodically and numbered successively.

For an elucidation of the nature of the publications issued under this collective name, he particularly referred to six successively numbered publications filed as exhibits with his answer, as

well as to the titles of the various numbers advertised by the complainants upon the cover of each copy issued. He also set forth the fact that the reprints published under the name of the "Riverside Literature Series" are sold as separate publications, complete in themselves, and are designed and used as text-books for the study of literature; and the fact that they are commonly sold at a reduced rate for ten or more copies of the same publication, and also at a further reduced rate for one hundred or more copies of the same publication. He also charged the fact that the same identical publications, bound in linen covers, without other or further change, are sold confessedly as books.

The Postmaster-General then averred that it was his duty to examine into all the facts and circumstances to determine whether or not such publications do now in fact comply with the statutory conditions for acceptance at the second-class rates; and that after notice to the complainants, a full, fair, and impartial hearing, and an inquiry into the facts, relative and material, an examination of evidence, and a construction of the law and the application thereof to the facts, the defendant, acting through the Third Assistant Postmaster-General in that behalf, found and determined that said publications now offered for transmission, not having the statutory characteristics of second-class mail matter, but, on the contrary, the characteristics of third-class matter,

were not entitled to admission to the mails at the second-class rates and that the certificate permitting such admission should for that reason be revoked and become inoperative in the future.

He further stated that said certificate of entry was not canceled, or complainants' said publications refused admission to the second-class rates, by reason of any regulation of the Department; but upon the sole ground that the said publications, by reason of the characteristics hereinbefore set out and contained in the third paragraph of his answer, do not constitute a periodical publication within the intent and meaning of the act of March 3, 1879, but that the said publications and each and every of them is a distinct and separate publication, complete in itself, not forming an integral part, issue, or number of a regular periodical, but each and every of them is within the intent and meaning of the terms "books, transient newspapers, and periodicals" as the same are employed in said act to define and designate mailable matter of the third class, namely, "miscellaneous printed matter." (Transcript, p. 10.)

Admitting that his action in excluding said publications from the privileges of the second-class rates is contrary to the practice of his predecessors, he further submitted that the admission and transmission of mailable matter under the terms prescribed by the statute is a continuous administrative act, the performance of which is devolved by law

upon the Postmaster-General for the time being, and that in the performance of this duty he is in no wise bound or controlled by the action of his predecessors; nor does the admission and transmission by one Postmaster-General of mailable matter of a certain kind at the second or any other particular rate constitute any obligation, contractual or otherwise, upon the United States or its officers thereafter to admit similar publications under the same name at such particular rate.

In the conclusion of his answer he further submitted that the complainants had not stated a case entitling them to the relief prayed; and to so much of the bill as prayed an injunction against the enforcement of the decision that the publications are not entitled to transmission at second-class rates, he submitted that it is against the course and practice of equity and not within the jurisdiction of the court to interfere with, review, or afford relief against the decision and action of the head of an executive department in a matter involving the exercise of his judgment and discretion.

To this answer the complainants filed a replication, stating that they would hear the cause upon bill and answer.

A stipulation was entered into that reference might be made at any hearing of the cause to all or any of the issues of the complainants' press published under the designation of the "Riverside

Literature Series," and the cause accordingly came on for hearing upon bill and answer.

On March 10, 1903, the single judge holding the equity court passed a decree declaring: (1) That the complainants are entitled to have their publications entitled the "Riverside Literature Series" received and transmitted through the mails as mailable matter of the second class, as defined by the act of Congress approved March 3, 1879; (2) that the Postmaster-General be perpetually restrained from enforcing and continuing the cancellation of the certificate of entry issued on September 15, 1900, and from refusing to receive said publications and transmit the same through the mails as mailable matter of the second class, in accordance with the provisions of the act of March 3, 1879, and from denying to the complainants the receipt, entry, and transmission through the mails of said publications entitled the "Riverside Literature Series" as mailable matter of such class.

From that decree the Postmaster-General prosecuted an appeal to the court of appeals of the District of Columbia. There, after full argument, the court by a unanimous opinion reversed the decree appealed from and remanded the cause to the court below with direction to dismiss the bill. It is from the decree of the court of appeals that the appellants have sued out this appeal.

THE BATES & GUILD CASE.

The Bates & Guild case was heard at the same time as the Houghton case, and, like it, was reversed and remanded with direction to dismiss the bill.

The only distinguishing feature of the case is that the publication in question had never been admitted to the second-class rate. It was a new publication, and its original application for admission having been rejected, the appellant brought its bill for the purpose of obtaining a mandatory injunction compelling its admission.

All of the material facts relating to the publication are set out in the answer to which, as well as to the bill, a copy of the only issue then existing of the publication was made an exhibit.

The important facts which must be taken as conceded are these:

The complainant, a corporation, is engaged in the business of publishing books and periodicals in Boston, Mass., having a known office of publication. The first of the series of publications, known and described as "Masters in Music," was issued by it in January, 1903. It is averred in the bill that such publications are regularly issued at stated intervals as frequently as four times a year, bear a date of issue, and are numbered consecutively; but inasmuch as at the time of the filing of this bill but one publication had been issued, this averment must be taken to indicate merely

that it was the *intention* of the publisher of such publications to issue them regularly at stated intervals.

The one issue thus published is designated MOZART. It is given up exclusively to that composer and appears to be made up of sheet music with critical and explanatory notes and a brief biographical sketch of the master.

About the time of the appearance of the first number, January 5, 1903, the appellant made an application in the usual form to have the publication admitted to the mails at the second-class rates of postage.

In due course of administration that application came to the Third Assistant Postmaster-General, who, in the distribution of powers in the Post-Office Department, is charged with the duty of ascertaining whether or not a publication conforms to the requirements for admission to the mails at the second-class rates of postage and to determine accordingly on behalf of the Postmaster-General. After consideration of the application and the copy of the publication submitted, that officer found that the said publication had the characteristics of third-class matter and not second-class matter. He therefore held and determined that it was not entitled to transmission at the second-class rates of postage and notified the publisher accordingly.

The facts upon which this determination rests

are set out at length in the third paragraph of the answer and admitted upon the record:

> The publication has the characteristics of third-class matter aforesaid in that it is a BOOK, to wit, a COLLECTION OF SHEET MUSIC BY A SINGLE COMPOSER, prefaced by notes and criticisms upon the work of such composer; that in respect to the matter purporting to be literature contained in said publication, it is, in substance and effect, a series of notes illustrative of the music aforesaid, or a monograph upon the life and work of the said composer. (R., p. 8.)

The Postmaster-General adds that the printed matter—

> Relates to a single subject and to a single individual, and that it is introductory and prefatory to the main and substantial contents of said publication, namely, sheet music. The defendant says that sheet music is matter of the third class, being "other matter wholly in print" within the intent and meaning of section 17 of the act of March 3, 1879. (R., p. 8.)

He further says that—

> The publication published under the title of "Masters in Music" is a series of distinct monthly monographs; that each monthly publication has for its subject a distinct composer of music; that each publication is complete in itself, and is a reprint of a collection of sheet music by the particular composer with whom such publication is concerned. (R., p. 8.)

And, referring to the copy of the publication filed with the bill as an exhibit, he points out—

> That no designation of the publication as a magazine, no date of issue or serial number appear therein from the first page to the last page of the same, and stripped of its cover no mark or sign of such publication as a periodical appears thereon. (R., p. 9.)

In conclusion he lodges an objection, similar to that in the Houghton case, that the finding and determination as to the facts involved in such application as this are not subject to judicial reexamination and review.

The case having come on to be heard upon bill and answer and the one issue of the publication as an exhibit, the judge holding the equity court, on March 10, 1903, adjudged and decreed: (1) That the complainant was entitled to have its publication entitled "Masters in Music" received and transmitted through the mails as mailable matter of the second class, as defined by the act of Congress approved March 3, 1879; and (2) that the Postmaster-General be perpetually restrained from denying to the complainant the receipt, entry, and transmission through the mails of its publication entitled "Masters in Music" as such mailable matter, and also from refusing to receive said publication and transmit the same through the mails as mailable matter of the second class.

On appeal to the court of appeals, that court, for reasons that will appear at length in the opinion,

reversed the decree below and remanded the cause with direction to dismiss the bill. (No. 273, *Bates & Guild* v. *Payne*, Trans., pp. 22, 23.)

THE SMITH CASE.

In this case the complainants are publishers of nine "libraries" or "series" of books known respectively as *The Magnet Detective Library*, *The Arrow Library*, *The Columbia Library*, *The Undine Library*, *The Medal Library*, *The Eagle Series*, *The Bertha Clay Library*, *The Diamond Handbook Series*, and *The Eden Series*, all of which they seek to have restored by mandatory injunction to the privileges of the rate for periodical publications from which, after notice to show cause and a hearing, they were excluded on November 4, 1901. (No. 481, *Smith* v. *Payne*, Trans., p. 14.)

In everything but names and dates the allegations are substantially the same as those in the Houghton case.

The publications issued under one of these library names are of the same sort as those issued under each and all of the other names. For aught that appears the library names would be practically interchangeable. Taking the Columbia Library as a fair sample, it is alleged in the answer and admitted by the replication, that among the facts upon which the publications were excluded from the second and relegated to the third class rate are the following:

> That each of the so-called issues or numbers of the "Columbia Library" is not an issue or a number of a periodical publication, but is a separate and distinct book, complete in itself; and that the so-called issues have no true relation or connection one with another, and that the only connection between the successive books issued under this name consists in the mere fact that along with the real title of each of said books, on the cover thereof, the publisher has printed the additional words "Columbia Library," and that such books are given consecutive numbers. (No. 481, *Smith* v. *Payne*, Trans., pp. 18, 19.)

Again:

> Said books are sold separately as books, complete in themselves, and are denominated "books" by the publisher thereof, as will appear by reference to the page immediately following the cover of a copy of one of said books, entitled "Rube Burrow's League," by Marline Manly, and filed herewith as a part of this answer as Exhibit No. 3, as well as by reference to the circular and "gummed labels" issued by the complainants and filed herewith as Exhibit No. 10.

It is also conceded by the complainants—

> That the additional title "Columbia Library," and the giving of consecutive numbers to such books, are a mere device by means whereof the complainants have endeavored to disguise the true character of

> said books and to give to them the appearance of a periodical publication, for the purpose of obtaining for them the rates of postage designed for periodical publications, and that, stripped of its cover, no mark, sign, or designation of any of the said books as an issue of a periodical publication appears thereon.

As to the supposed date of issue of these publications, the Postmaster-General also says:

> It has been the practice of the complainants to print in minute type, in an unusual place on the back of the cover of each of said books, in a manner calculated to escape the notice of the public, a supposed date of issue; but the defendant avers, however, that the printing of such date is done as a mere artificial, technical, and formal compliance with the statutory requirement providing that the successive numbers of a periodical publication should bear a date of issue, and that the addition, in the manner above stated, of the date of issue, is intended to disguise the true character of each of said publications, which is that of a separate and independent book, and in aid of the original purpose of the complainants to simulate, for the purpose of postal rates, a periodical publication. (Trans., p. 19.)

The cause was heard upon bill and answer in the supreme court of the district where the injunction was denied, and the bill dismissed on the authority of *Houghton* v. *Payne*. On appeal to

the court of appeals it was conceded by the appellants that the case was not distinguishable from the Houghton case, and the decree was accordingly affirmed.

It is from the decrees of the court of appeals, dismissing or directing the dismissal of these three bills, that the appellants respectively appeal to this court.

ARGUMENT.

FIRST POINT.

The second class of mailable matter, designated by the act of March 3, 1879, does not include books, whether published singly or grouped in a library or series.

The statutes of the United States provide for four distinct classes of mailable matter.

First. Written matter.

Second. Periodical publications.

Third. Miscellaneous printed matter.

Fourth. Merchandise.

This classification is exhaustive. In order to be transmitted, everything offered for mailing must fall within one of these classes; and it can not fall within more than one.

Relatively speaking, the first and fourth classes are simple. The term "written matter" and the term "merchandise" are each fairly definite, both as to their connotation and denotation. Yet it would be a mistake to imagine that the determination whether a particular packet is written matter or another is merchandise is never difficult or doubtful. Seemingly definite in themselves, in point of fact each of these classes is really defined to a considerable degree by the denotation of each and all of the others. And the only practicable

definition of the fourth class is anything that is mailable and not within the first, second, or third class. In short, the true scope and extent of any one class is only intelligible from a survey and comparison of all of the other classes.

When we come to the second and third class, this is peculiarly and emphatically true.

The term "periodical publications" has not the clearness and definiteness of the term "written matter." In like manner, the term "miscellaneous printed matter" is not only vague and indefinite in itself, but necessarily implies a reference to printed matter of some other kind and (because the classification is exhaustive) embraced within some other class.

It is in distinguishing these classes that the difficult and delicate work of the postal service is done, and in dealing with these classes, Congress has found it necessary to indicate a little more fully what it had in mind. In respect to the third class, it has attempted to do so by the process of simple enumeration:

> SEC. 17. That mail matter of the third class shall embrace books, transient newspapers and periodicals, circulars, and other matter wholly in print (not included in section twelve), proof sheets, corrected proof sheets, and manuscript copy accompanying the same.

It is evident that this process of enumeration has not removed all difficulty in the application of the

rate. We have now to deal with a number of terms the precise meaning of none of which is defined by the act. "Books!" What is a book, unless it be what people commonly understand by the word? What is a "newspaper?" What is a "periodical?" Again, what is "other matter wholly in print (not included in section 12)?" This expressly refers us to section 12, and shows not only that the third class is unintelligible without a comparison with the second, but also that the two sections are complementary and mutually exclusive.

From this examination of section 17, defining the third class, we learn at least that anything commonly known as a book must be of the third class, and can not be of the second, and that other matter wholly in print, although it may not properly be called a book, a transient newspaper or periodical, or a circular, must be of the third, except it be included in section 12. Now, there is no matter *included* in section 12 save the advertisements which are thereby permitted to be inserted in periodicals.

Let us turn to the section dealing with periodicals. Here, in section 10, we find the enumeration which is to make clearer the indefinite term "periodical publications" used in section 7 to denote the second class. It is this:

> SEC. 10. That mailable matter of the second class shall embrace all newspapers and other periodical publications which are

issued at stated intervals and as frequently as four times a year, and are within the conditions named in sections twelve and fourteen.

Now, let us observe that it does not say that mailable matter of the second class shall embrace all publications which are issued at stated intervals and as frequently as four times a year, and are within the conditions named in sections 12 and 14. But it expressly says "all newspapers and other periodical publications" which are so published and within the conditions named. It is obvious and indisputable, then, that sections 12 and 14 do not contain all the conditions or definitions by which mailable matter of the second class is to be distinguished. Such matter must not only be within the conditions named in those sections, but it must be first of all "a newspaper or other periodical publication," and also within those conditions.

In other words, mailable matter of the second class must not only be within sections 12 and 14, but it must be within section 10 as well, and be a "newspaper or other periodical publication" in the ordinary sense in which Congress used these terms.

That Congress attached to these terms their usual force and meaning apart from the mere enumerated conditions in section 14 is also shown by section 12, to which, as naming conditions, reference is likewise made in section 10.

If we turn to section 12 we find that it does not really name any conditions at all. It provides first that:

> Matter of the second class may be examined at the office of mailing, and if found to contain matter which is subject to a higher rate of postage, such matter shall be charged with postage at the rate to which the inclosed matter is subject.

It provides, secondly:

> That nothing herein contained shall be so construed as to prohibit the insertion in *periodicals* of advertisements attached permanently to the same.

Here the word "periodical" is plainly used as a term having a usual and common acceptation and as equivalent to the "newspapers and other periodical publications" of section 10. No argument, then, can be hinged on the term "periodical publications" as perhaps including things not "periodicals" in the accepted sense of the term. Congress uses them interchangeably and as equivalents. This shows plainly that the class of publications to which it was proposing to give this nominal, this subsidized rate, was the one clearly present to the mind of the world as periodicals. We shall show later on that this was in accordance with a settled policy, and a plan gradually evolved through years, to extend this privilege to a well-known class of objects.

That the class of objects upon which Congress was conferring this privilege was that of *periodicals*, as generally understood, is also shown by section 15.

> SEC. 15. FOREIGN NEWSPAPERS AND OTHER PERIODICALS OF THE SAME GENERAL CHARACTER as those admitted to the second class in the United States may, under the direction of the Postmaster-General, on application of the publishers thereof or their agents, be transmitted through the mails at the same rates as if published in the United States.

Here, again, not only do we again have the term "periodicals" used as a known substantive in place of "periodical publications," but, what is equally significant, it is once more coupled with the leading term "newspapers" by the assimilative words "and other."

Nor are these the only instances of the interchangeable use of the term "periodicals" as the equivalent of "periodical publications." In section 17 we have transient newspapers and periodicals. And again, in section 25, which gives free transmission within the county to publications of the second class, the proviso excepting delivery by carriers speaks only of "periodicals."

In short, in sections 12, 15, 17, and 25 we have repeated and unmistakable signs that Congress, in providing the second-class rate, was aiming to assist a definite class of publications presented to its mind by the common and generally understood word "periodicals."

If we turn now to section 14 we find only further confirmation of this. The things, we remember, which were to comply with sections 12 and 14 were the newspapers and other periodical publications mentioned in section 10—elsewhere expressed as the "periodicals" in section 12, and "the newspapers and other periodicals" in section 15. Now, what were the conditions of section 14? First, we find *repeated* the requirements of section 12, "that it must be regularly issued at stated intervals as frequently as four times a year." Added to this is that it must "bear a date of issue and be numbered consecutively."

Second. It must be issued from a known office of publication.

Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.

Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers.

Provided, however, that nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation or for circulation at nominal rates.

That all of these requirements are designed as *additional* limitations or safeguards is clear from even a casual inspection.

(*a*) To require periodicity of at least once a quarter is to guard against an extension of the periodical concept to include the annual miscellany, at that time a more common form of publication than at present, while the interval of publication, not being restricted to less than three months, permitted the continued admission of the quarterly reviews, a recognized and historic type of periodical.

(*b*) To require the issuance from a known office of publication was an additional safeguard against the inclusion under one name of publications not really parts of one recognized whole. The office of publication might, indeed, be removed from one place to another, but there should not be half a dozen pamphlets not parts of the same whole issuing out of separate and different offices. The provision was equally useful for administrative purposes, in view of the peculiar method by which publications of this class were to be mailed, viz, not singly and stamped but in bulk, by weight, upon a memorandum of mailing. It also operated to prevent their being transported at this special rate while they remained, so to speak, so much dead matter or mere material. Until set in motion as being agencies of public intelligence by actual issuance from the office of publication, they were

not, properly speaking, periodicals entitled to that rate but mere printed matter; as, for example, while being transmitted in advance of publication, from the printer to the publisher.

(*c*) To require that the printed paper sheets should be without board, cloth, leather, or other substantial binding was likewise an additional safeguard. A periodical, such as a quarterly review, or even a monthly magazine, would be none the less a genuine periodical if each issue were bound in cloth or leather. Such binding, being unusual, might indeed be evidence tending to show, with other circumstances, that the bound issue was not really part of a continuing whole, but a distinct thing having a different purpose. But an issue of the Atlantic Monthly or the Edinburgh Review would not of necessity lose its character of periodical because it might happen to have a cloth cover.

But in extending this valuable privilege of practically free carriage Congress doubtless desired to accomplish its great public purpose without needless expense. It is not necessary that a periodical intended for the use of the hour (however important that use may be) should have the weighty and permanent binding usual with books. Its bulk does not require it and its price ordinarily excludes it. Congress, then, did everything needful for that class of periodicals without undertaking to carry free the dead weight of leather

binding. This provision was an additional safeguard designed as a bar to bound periodicals.

It is a singular perversion that finds in this prohibition against periodicals with heavy permanent bindings an invitation to books without bindings. It is a complete misunderstanding of the statute to see in the binding the sole controlling criterion of a periodical. A periodical is no less a periodical when it is bound—only when bound the statute says it may not be carried at 1 cent a pound. A book is no less a book when the binding is off. It is third-class matter, whether it be bound or unbound, or even in the form of proof sheets without a stitch to hold them together, as is provided in section 17. To seize upon this distinction of binding as the test of a periodical is blindly to ignore not only the whole intent, purpose, and spirit of the act, but the plain language of its various sections. It is into this error that the learned counsel for the complainants Houghton et al. have steadily fallen throughout this case. They persist in taking this section as the one that discriminates between second and third class matter, when that clearly is not its office. They seem to think that because the kind of binding forbidden to a periodical is that of "substantial binding, such as distinguish printed books for preservation from periodical publications," binding of that sort is the sole test or mark of books; and that if a book is bound in flimsy binding, and not for preservation, it ought not to be excluded. But the

statute does not speak at all of binding as distinguishing books from periodical publications, but only in a descriptive phrase as distinguishing *books for preservation* from periodical publications. That is to say, in telling what kind of binding a periodical may not have, it uses that phrase as descriptive and explanatory of "substantial" binding—"substantial binding, such as * * *." A book may not have a substantial binding for preservation, and yet be a book for all that.

It is hardly necessary, however, to point out that the second class is not for books at all, but for "newspapers and other periodical publications." No books are included in the second class. All books are expressly included in the third class; not books for preservation merely, but all books. Before you come to the question of binding you must first settle that of periodical *vel* book. And even if it be a periodical, a substantial binding will work its exclusion. And that is all that is said and meant by the third condition of section 14.

(*d*) Coming now to the fourth and last condition prescribed by section 14, let us see if anything in that supports the view that a periodical may consist of a series of books:

> Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the arts, sciences, or some special industry.

It must be originated and published. We have here in the legislative mind an entity. Something—the "it" of the statute—which is conceived as having an origin and a continuity. It must be originated for a purpose, and must be thereafter published for the same purpose. It is manifestly thought of as existing in itself and having parts, not as a mere fiction invented to hold together by a sham device separate and independent wholes. The words are perfectly consistent with the idea of a newspaper or other periodical publication, as the world understands it. They are incompatible with the concept of independent novels, of separate law books, or of disconnected reprints of classic English and American literature, bound together only by the device of a collective name. It is instructive to observe that counsel for Houghton et al., whenever they describe their publications, can not help but speak of them in a way which shows at once that they do not constitute *a* periodical publication. They are forced to describe the Riverside Literature Series as "a series of periodical publications." But if the Riverside Literature Series is rightfully in the periodical class it can not be as a series of periodical publications. The law does not provide for the admission of series of periodical publications. It must be itself *a* periodical publication. *Harpers*, or the *Century*, or *McClures*, or the *Cosmopolitan* is not a series of periodical publications; each is itself a periodical publication.

The next words only strengthen the same idea—originated and published *for the dissemination of information of a public character*. Not, it will be observed, that it shall *contain* information of a public character, but shall be published *for the dissemination of* such public information. Each of these words is significant, and each gathers significance from its neighbors. *Dissemination* is here a word of strong color and tinges all the rest. It indicates a dynamic process; an agency at work carrying out a purpose for which it was originated and set in motion. But strong as the word dissemination is, it is fortified by the use of the word *information*. An agency for the dissemination of knowledge, for example, might better consist with the idea of a library of books. But the word is not knowledge, but information. The distinction is obvious. One has the sense of accumulated stores—the other of imparting the idea of things for current needs. One is, as it were, human experience at rest; the other, human experience in action. One may be as stale as you please; the other must be new, fresh, vital. A book, a volume, is the medium of one; a journal, the medium of the other. "Information," says the Century Dictionary, "is timely or specific knowledge respecting some matter of interest or inquiry." It is, as it were, vitalized knowledge; knowledge imbued with life and activity. Nor when we come to the next phrase do we find any change in the idea—"or devoted to literature, the

sciences, arts, or some special industry." *Devoted* to literature. Mark you, not that the publication shall be literature or contain literature, but that it shall be devoted to literature. What is meant by "devote?" The Century Dictionary puts it thus: "To direct or apply chiefly or wholly to some purpose, work, or use; to give or surrender completely, as to some person or end, as to *devote* oneself to art, literature, or philanthropy." There again we have the idea of a permanent, continuing entity—a thing existing for a given purpose, appearing regularly, at such intervals (not greater than three months) as may most effectually meet its needs, in the interest of art, of science, of literature.

Do we say that a book—a novel, a history, a drama—is devoted to literature? It is not devoted to literature; *it is literature;* and it would be an absurdity to speak of it as devoted to itself. Such a locution would be merely a willful perversion of language.

On the other hand, a review or a magazine may be said to be devoted to literature with perfect naturalness and propriety. For we rightly conceive of the review or magazine as one definite recognizable entity—a continuing whole, originated for a given purpose and made up of similar parts having a common object—literature, for example, or art, or science, or whatever else it is to which the whole is devoted.

Taking these words, "Originated and published for," "dissemination," "information," "devoted to"—they all point to one conclusion. They are, we repeat, strong and pregnant words. There is but one concept consistent with them all. We confidently submit that an attentive reading of the statute will leave no doubt that what Congress constantly had in mind in the creating of this privileged class of publications was the universally recognized, commonly accepted, and perfectly well understood PERIODICAL of every day speech.

That this is the meaning of the statute is confirmed (if confirmation were needed) by the entire history of postal legislation, from its beginning to the date of the act itself.

An examination of the prior statutes indicates beyond a doubt that the abiding intention of Congress was to extend the benefit of a comparatively nominal rate, at first to newspapers only, and afterwards as well to other periodicals performing a similar public function.

At no stage of the legislation were books, *bound or unbound*, admitted to this privilege.

By the act of August 30, 1852 (10 Stats. L., 37), "books, bound or unbound, not weighing more than 4 pounds," were first made mailable. They were given a flat rate of 1 cent per ounce. By the same act, newspapers and periodicals, mailed singly, were 1 cent for each copy not exceeding 3 ounces; and when paid in advance,

quarterly, or yearly, even that rate was cut in half. The rate for books, bound or unbound, was thus at least six times as great as that for periodicals.

By the act of March 3, 1863, which established the existing division into classes, a special, low rate of 1 cent each was fixed for "*newspapers, magazines, and other periodical publications*" issued less frequently than once a week and sent to regular subscribers. For "newspapers and other periodical publications" issued once a week, or more frequently, and sent to regular subscribers there was provided an even lower quarterly rate, begining with the weeklies at 5 cents a quarter. On the other hand, miscellaneous matter of the third class, pamphlets, occasional publications, etc., was at the higher rate of 2 cents per 4 ounces, which rate, in the case of books, was again doubled. (Act March 3, 1863, secs. 34, 35, 36, 12 Stats. L., 707.)

Section 43 of the same act permitted the free exchange between publishers of copies of their "periodicals, magazines, and newspapers."

The same policy was manifested in the act of June 8, 1872 (17 Stats. L., ch. 385, p. 283). The low quarterly rate for newspapers and periodicals sent from a known office to regular subscribers was maintained, and it was further provided "that persons known as regular dealers in *newspapers and periodicals* might receive and have sent them at the same rates as regular subscribers who pay quarterly in advance."

Two things are here apparent: First, that it was the intention of Congress to assist publications whose aim it was to bring to the public the discussion, inquiry, news, and thought of the day, and to encourage them in proportion as the publication, by frequency of issue, met that need.

Second. That in the legislative mind the terms "newspapers, magazines, and other periodical publications" were grouped as cognate ideas, and represented a recognized, definite, and particularly meritorious class, distinct and different from books.

In the act under discussion Congress did not depart from this settled policy. It grouped "newspapers and other periodicals" in a class by themselves, and fixed for them the unusually low rate of 2 cents per pound. Miscellaneous printed matter, including books, it set apart in a distinct class, for which was fixed the rate of 2 cents per 4 ounces, prepaid by stamps affixed, and finally, when (act Mar. 3, 1885, 23 Stats. L., 387) it further reduced the bulk rate for periodicals to 1 cent a pound, it left the miscellaneous printed matter precisely where it was before.

By a long Congressional usage we find the term "newspaper and other periodical publications" used as representing a definite and specially favored type or class of publications, the mean or common term of which (so to speak) was "magazines."

All of the things denoted by these words have recognized qualities in common as agencies for the dissemination of timely information among the people and as vehicles of contemporaneous thought, and it was because of the common qualities which we all recognize in them that Congress desired and proposed to grant them special privileges.

The conclusions resulting from an analysis of the act, as well as from the history of the legislation, are again confirmed by the peculiar provisions of section 15.

That section is as follows:

> SEC. 15. Foreign newspapers and other periodicals of the same general character as those admitted to the second class in the United States may, under the direction of the Postmaster-General, on application of the publishers thereof or their agents, be transmitted through the mails at the same rates as if published in the United States.

It was common knowledge that on the continent of Europe all books are published originally without substantial binding. In France and in Germany, for example, as Congress well knew, practically all books make their appearance in paper covers. They are sold by the publishers and booksellers in that form. After having read a book, if the purchaser thinks the book merits it, he has it bound for himself. Such is the universal practice. This is true not only of novels, plays, and other works of fiction, but of the monumental works of

science, history, and philosophy. If the only distinction that Congress had in mind between a book and a periodical publication was that of binding, then it was perfectly plain that the whole mass of foreign continental literature might, through the very simple device of a serial name and number, be transported through the American mails at the second-class rates. It is plain that Congress could have had no such intention. In permitting the transmission of foreign periodicals at the same rate as American periodicals, it had in mind only the transmission of the genuine, real periodicals of Europe. Congress obviously did not mean by periodicals merely books in paper covers.

Now, in this section we find that the privilege is extended to "foreign newspapers and other periodicals of the same general character as those admitted to the second class in the United States." These words plainly indicate—

(1) That, as we have already pointed out, the term "periodical" is used as a substantive, denoting a class, and having the same general meaning as the term "a periodical publication."

(2) That the term "newspapers and other periodicals" is again employed as a common description of a general class.

(3) That Congress had in mind, in admitting foreign periodicals, things having *a general character*, the same general character as those admitted in the United States; in other words, that the

periodical literature of Europe and the periodical literature of America are regarded as corresponding and equivalent things.

(4) That in extending the privileges to publications of countries where books are customarily issued unbound, Congress again indicated that the distinguishing mark between a book and a periodical is not the binding.

That Congress, when it used the term books in this statute, meant the things properly denoted by the word without regard as to whether they were bound or unbound is proved to a demonstration by the last paragraph of section 17:

> "Printed matter other than books received in the mails from foreign countries under the provisions of postal treaties or conventions shall be free of customs duty."

Books only must pay duty. All printed matter other than books is duty free. But according to the appellants nothing is a book unless it is bound. The whole mass of unbound French and German publications, then, being "other than books," must, under this act, have been entered free of customs duty—a result not less absurd than inevitable, and one in no wise relieved because later tariff acts making the same provision for the free entry of newspapers and periodicals have been so worded as to make the exclusion of books absolutely obvious. The point is that the appellants' argument that "books" in section 17 meant

only bound books must, under the concluding clause of the same section, of necessity have led to this manifest absurdity.

Summing up the results of our examination of the statute in all its sections we find—

First. That all books are third-class matter.

Second. That not all publications which comply with the conditions of section 14 are second-class matter; but that all *newspapers and other periodical publications* which comply with the conditions of section 14 are second-class matter. In other words, the enumerated conditions of section 14 are not descriptive of the kind of publication which is to be admitted to the second class under sections 7 and 10, but they are express limitations added to the description in those sections. Notwithstanding a publication might comply with each and every of the express conditions enumerated in section 14, it is not entitled to the second-class rate unless it be first a periodical within the meaning of sections 7 and 10 and not a book under section 17. Section 14 is by no means the conclusion of the whole matter.

Third. That in the mind of Congress the terms (1) "periodical publications," (2) "newspapers and other periodical publications," (3) "periodicals," and (4) "newspapers and other periodicals" are used in the act as meaning one and the same thing, and are equivalent and interconvertible terms.

Fourth. That the class of things which Congress meant by these equivalent and interchangeable

terms—"periodicals," "newspapers and other periodicals," "periodical publications," "newspapers and other periodical publications"—is the class of things known and recognized as the periodicals of common speech as distinguished from the books of common speech.

The use of these terms, as well as the prior legislation, indicates a set and constant purpose and intent to assist for reasons of policy a known and definite type of publication. In the mind of Congress, the term "periodical" meant, as in popular and ordinary use, a thing and not a name. It meant a permanent, continuing thing, the separate issues of which must be parts of the same thing and not a mere name used as a cover for distinct things, each of which, taken alone, belongs plainly to another class.

Fifth. That the issuance at intervals of a lot of books in paper covers under the name of a Library or a Series is not the "periodical" that Congress had in mind. It is neither the "periodical publication" of section 7, nor the "newspaper and other periodical publication" of section 10, nor the "periodical" of section 12, nor the "newspaper and other periodical" of section 15. To hold them to be such is to do violence to the meaning of the words. It is to obtain for one class of objects, by the cheat of a false name, the rates designed for another. Such a makeshift publication is against the plain intent and purpose of Congress. It is a fraud upon the statute.

SECOND POINT.

The publications issued under the collective name of the "Riverside Literature Series" are not a periodical publication in the common, statutory, or any other sense of that term. Such publications are a collection of reprinted books, and as such are mailable matter of the third, and not of the second, class.

At the outset, we desire to impress upon the court that what the "Riverside Literature Series" really is must be learned not from the pleadings, but from the publications themselves. This, if ever, is the case where the things speak for themselves. The pleadings can do little more than supply a pale, cold, and abstract reflection of what the mind takes in at once when the actual volumes are presented to the eye.

By stipulation, all and any of the publications issued under the designation of the "Riverside Literature Series" are open to the inspection of the court. At the hearing all the publications of this series will be produced, and twenty minutes spent in examining the successive volumes will do more to make their true nature and relation to one another plain than the reading of numberless pages of description and comment. It was by an examination and study of the things themselves that the Postmaster-General determined that they were

not issues of a periodical publication; and we respectfully submit that it is only by a similar study that it can be determined whether he was right or wrong.

Let us look, for example, at the six numbers, 140–145, made part of the record in this case as Exhibits A to F. The first, No. 140 (quintuple number), is Thackeray's *Henry Esmond*. It is the same *Henry Esmond* we find on the bookshelves of the library and the booksellers. It was originally published in 1852. It is here the same work, line for line and letter for letter, that it was when first published. It is a volume of 493 pages. What is the difference between this copy of *Henry Esmond* and any other copy of *Henry Esmond*? At the upper left-hand corner of the cardboard cover there is inscribed in small type, "*Issued monthly*, September to June." But, clearly, *Henry Esmond* is not issued monthly, September to June. Over the title of the book and on the same cardboard cover is printed "Riverside Literature Series," and over the title of the book on the title-page is printed, in smaller type, "The Riverside Literature Series," and in the center of the cover, but not on the title-page, appears "No. 140 (quintuple number)." Magical words! The *Henry Esmond* which five minutes ago was a book is no longer a book, and is an issue, a number, of a periodical publication. But, may we ask, of what periodical publication? Even if we take the words "a periodical publication" to mean nothing more

than a publication issued periodically, it nevertheless remains that it must be the same publication. It is the publication that is issued periodically; and the next issue must be an issue of the same thing.

Then let us look at the next issue. It is *Three Outdoor Papers*, by Thomas Wentworth Higginson. At the upper margin of the cardboard cover likewise are the words "Issued monthly, September to June, No. 141, March 7, 1900." None of these things, however, appears on the title-page, where the only thing that serves to mark these papers, then 11 years old, is the legend "The Riverside Literature Series."

And so with No. 142, *Sesame and Lilies*, by John Ruskin, complete, unaltered, and unabridged, just as it had been originally published by the author more than twenty years before. It is almost amusing to see how quickly the disguise of a periodical is dropped after we leave the outer binding. The title-page does not disclose it, and on page vii of the introduction we read these eloquent words:

> The author's preface to *Sesame and Lilies* indicates something of the regard with which Ruskin looked on the *book*.

But the same *Sesame and Lilies* that twenty years ago was looked on as a book, and the same book which the author of the introduction here plainly classes as a "book," we are assured by counsel is not a book, because it is marked "No. 142," and because a certain time before it was

printed the publishers printed another book, and because a certain time after it was printed the publishers proposed to issue still another book, and have seen fit to call all of the books the "Riverside Literature Series."

Remember that we are dealing with successive issues of this periodical publication. No. 143, which follows *Sesame and Lilies*, is Plutarch's *Alexander the Great*, done into English by Sir Thomas North. Is *Alexander the Great* an issue of *Sesame and Lilies;* and if so, what may be the connection between the two of them and *Henry Esmond?* But, seriously, the periodical mask is dropped in this case as quickly as in the other. At page ix of the introductory note appears the following:

> Neither the 1579 edition nor the 1595 is consistent, and the editor of this *little volume*, therefore, has not felt it incumbent upon him to be absolutely consistent himself.

Not to speak of Plutarch, is it not straining things a little to argue that in creating a special rate for newspapers and other periodical publications Congress intended to include either a reprint of the edition of 1579 or the edition of 1595 of Sir Thomas North's spirited translation?

Still taking these things successively, next after Sir Thomas North comes No. 144, *The Book of Legends*, by Horace E. Scudder. Here, too, we find no suggestion of the periodical after we pass

the cardboard cover. The first words of the preface tells us:

> This little *book* follows the general design of *The Book of Fables* and *The Book of Folk Stories*.

Nos. 145 and 146, the two remaining exhibits filed with the answer, tell the same story. The first is Hawthorne's *The Gentle Boy and Other Tales*. The second is Longfellow's *Giles Corey of the Salem Farms*. The latter was written and published in 1868.

These seven consecutive numbers are a fair illustration of the entire series of publications, but, as we said before, we invite the attention of the court to all of them, in order that it may plainly appear what the "Riverside Literature Series" really is.

Of what thing are all these several publications issues? It can only be answered "Issues of the Riverside Literature Series." What is there of the "Riverside Literature Series" in No. 141—the *Three Outdoor Papers* of Thomas W. Higginson—that was in No. 140—the *Henry Esmond*, of Thackeray? Nothing but the name "Riverside Literature Series" itself. In this business of the postal rates we are not dealing with names; we are dealing with things. There is in fact nothing to answer to the name of the so-called periodicals. It becomes obvious that the name of the "Riverside Literature Series" is a mere fiction, invented to disguise and mask the real thing, namely, the

books which it is sought to transmit at a lower rate than other books.

In truth, the adoption of the name *Series* is an admission that the thing is not a periodical publication. To call the collection of books by a genuine periodical name—Riverside Monthly, Riverside Quarterly, Riverside Weekly, Riverside Review—would be too grotesque, so we must invent some name not too far from the facts. But in attempting to avoid the absurd the fiction becomes transparent. The statute makes no mention of *series* of publications, or *libraries* of publications. It says "a periodical publication," "a publication." It is not a collection of publications that is to be admitted, it is a publication—something having an existence and character of its own that may be recognized from issue to issue. A whole made up of similar parts, not a series of wholes, figuratively bound together by a name.

For if the fiction of a name can transmute a collection of books into a periodical publication, there is no limit to the kind, size, or form of book that may not be embraced under that name. The statute places no restriction on size or shape. It makes no express requirements as to uniformity from issue to issue. It requires only that the issues shall be issues of a "periodical publication." Once grant that the name creates the publication, that the Post-Office Department can not look beyond the name and the serial number to see what the thing really is, then all the multiform products

of the press will pass as issues of some supposed periodical, as indeed they have hitherto done. Then shall we see again the actual case (upon which we shall hereafter comment) of an atlas, a cook book, an illustrated natural history, all appearing successively as numbers of one and the same periodical publication, *Farm and Fireside Library*. Much periodical literature may perhaps be the product of scissors and paste, but it was reserved for the ingenuity stimulated by a subsidized postal rate to transmute a library of books into a periodical publication by the simple process of sticking on a label.

The conviction as to what the "Riverside Literature Series" really is, produced by an examination of the publications themselves, is amply confirmed by what the publishers openly declare it to be in their public announcements:

> The most interesting Masterpieces of the most famous Authors, printed from large type and issued in inexpensive form for use in schools. Published periodically. The prices given below are net, educational, postpaid. (See Exhibit G, p. 7.)

Such is the open declaration—"Masterpieces of the most famous Authors," issued for use in schools, and, as indicated, to be sold as other schoolbooks, at the prices named.

Again, we find in the same catalogue:

> The Riverside Literature Series is the result of a wish on the part of the publishers to issue in an inexpensive form for school

> use the most interesting and instructive masterpieces of the greatest writers of America and Great Britain. (Ex. G., p. 4.)
>
> In order that the reader may be brought into the closest possible contact with the author, each masterpiece is given as it was written, unaltered and unabridged, and the notes, while sufficiently helpful, are not so voluminous that the reader's mind is occupied with the editor rather than with the author. (Ex. G., p. 4.)

In the same announcement we are also told that the Series contains—

> * * * a pleasing variety of reading matter in Biography, History, Poetry, Essays, Literary and Descriptive, Natural History, and Mythology, *suitable for the study of Literature*, for Supplementary Reading, and as substitutes for the graded Readers.

Here is struck the keynote. The obvious purpose of the publishers is to sell for use in schools text-books for the study of literature in the higher grades and substitutes for the graded readers in the lower grades. Naturally, they desire to get these texts and substituted readers into the schools at the lowest possible cost to themselves. The school readers commonly used, not pretending to be anything but books, must pay postage at the third-class rate, or 1 cent for each 2 ounces; but if you can so varnish your reader that it will look like a periodical you can send it at 1 cent a pound—hence, the Series.

Again, in the same announcement, we find:

> While each number has been issued in paper covers, many single numbers, and many combinations of two or more numbers, have been bound in linen covers also in response to a demand for a larger amount of material in a single volume with a more permanent binding.

"Combinations of two or more numbers." "A demand for a larger amount of material." Here again we are let into the secret. In the case of a real periodical, it is the last number that is being demanded by the public, is being sold by the newsdealers, and is being transported through the mails. This is a necessary consequence of its essential character as a periodical. The postal service is not to-day being called upon to transport to any appreciable degree *Harper's* of March, 1886. The demand for a genuine periodical is a periodical demand; the transmission of a genuine periodical is a periodical transmission. But No. 1 of the "Riverside Literary Series," Longfellow's *Evangeline*, published March 17, 1886, more than sixteen years ago, is being transported in equal, if not greater, volume than when first published, and in vastly greater volume than the last number, 154, Shakespeare's *Tempest*. Why? Because Longfellow's *Evangeline*, which is denominated No. 1 of this *series*, is only No. 1 by courtesy, and is in as much demand as a schoolbook to-day as it was when it was first issued, and it is the hope, doubt-

less, of the publishers that twenty years hence it will be in greater demand than it is now.

In the case of such a series, the natural order of things is entirely reversed. Congress desired plainly enough to have the current thought, news, and discussion of the day brought to the homes of the people, and was willing that the public treasury might bear the greater part of the burden, but it never could have contemplated that its willingness thus to carry the issue of a periodical from time to time might, by a mere gloss of words, be made use of to transport a constantly increasing volume of matter published long before, matter the volume of which would increase directly with its age.

Everything about the public announcements of the complainants indicates that the disguise of a periodical is only skin deep. The announcement of the *Series* is called a "Catalogue." It is just like any other publisher's catalogue. The publications are classified by authors, for example:

Joseph Addison—Richard Steele—
Eustace Budgell

60, 61. The Sir Roger de Coverly Papers. With Introductions, Notes, Portraits of Addison and Steele, and facsimile page of The Spectator.

	Paper.	Cloth.
In two parts, each	15	
Also in one volume		40

* * *

Thomas Bailey Aldrich

124. Baby Bell, The Little Violinist, and Other Verse and Prose. With a Biographical Sketch, Portrait, and Notes 15

And so it continues throughout. Mark this also, that **nowhere in the catalogue, from one end to the other, does there appear the date of a single issue.** If the publisher regards them as books, why not we? They are announced as books, they are published as books, they are catalogued as books, the world buys them as books, without a thought as to the date of issue, and it is only the poor Post-Office Department that is compelled to fix its eye upon the minute typography of the date of issue which is tucked away in the upper left-hand corner of the cover, and so gazing, to swallow all the rest.

Two other features of the series indicate its character:

First. The grouping of issues published at widely different times in grades for school use.

Grades II, III.

P. Hiawatha Primer ..... .40
V. The Book of Nature Myths ..... .45
47, 48. Scudder. Fables and Folk Stories. Each No. .15
59. Scudder (Editor). Verse and Prose for Beginners in Reading ..... .15 .25
49, 50. Hans Andersen, Stories from ..... .15
117, 118. Arabian Nights, Stories from the. Each No. ..... .15

Here we find so-called numbers jumping from 47 to 118. In the other grades the same thing appears; Grade VII, for example, includes both No. 4 and No. 120. What are the publishers at in doing this? Are they not carrying out the design with which this series was originated and has been continu-

ously published? Does this not plainly indicate that the object is to supply readers for schools? Having got into the second class (by the simple device of publishing them from time to time with a serial number), a vast number of school texts, the publishers, grouping these texts into grades, obtain an advantage in the competition in school-books by sending theirs, published five, ten, or fifteen years ago, through the mails at the rate for periodicals. Thus it comes about that, as stated in the eighth paragraph of the bill (R., p. 5)—

> Your orators are liable, under existing contract, to supply upward of two million copies of these publications at a price based upon the postage rate chargeable upon them as mailable matter of the second class.

Two million copies of what? Of the last issue? No such pretense is possible. But two million copies of all the issues from No. 1 down—thousands of copies of *Evangeline*, published sixteen years ago; thousands of copies of *Wonder-Book*, published sixteen years ago; thousands of copies of *Benjamin Franklin's Autobiography*, published sixteen years ago.

Another conclusive proof of what the series really is may be found in the so-called extra numbers. In the answer (R., p. 8) it is averred, and, by the setting down of the cause upon bill and answer, is conceded to be true, that—

> And the defendant further avers that the complainants have been in the practice of

> printing, under the said style of the "Riverside Literature Series," so-called extra numbers, designated not by numbers but by letters of the alphabet, which said extra numbers are of the same kind and nature and in all respects similar to the periodically published numbers issued and numbered consecutively.

It is more instructive, however, to look at the things themselves.

Number 57. Extra. Special Number K. February, 1893. *The Riverside Primer and Reader.* This number 57 is an integral part of the series, and, under the prayer of the bill, entitled to transmission at the second-class rates. But the moment we look below the outside cover we find that it is nothing more nor less than a child's primary reader, similar to the well-known primers of our childhood, and arranged, as they were arranged, in progressive lessons.

So obvious is the character of this publication that, apart from the minute numbering of the cover margin, there is no pretense that it is not in all respects a simple book. For instance, the Introduction tells us frankly that "This *primer* and *reader* is designed to serve as the sole *text-book* in reading required by a pupil" (p. 3).

Again, in the same introduction, we find: "There are two principles which the compilers of this book have kept steadily in mind" (p. 3).

Again: "The second lesson in this book" (p. 4).

Again: "The design of the book is to give these examples" (p. 8).

Again: "Thus this book, which would ordinarily be called a primer and first reader" (p. 9).

One other example will suffice. Number 58. Extra. (Double Number L) April, 1893. "*The Riverside Song Book, containing classic American poems set to standard music.*" An examination of this work shows that it is a collection of well-known popular songs, such as "My Country, 'tis of Thee," "Home, Sweet Home," with their musical scores, and also some poems for the first time set to music, accompanied by their musical scores. The book is 2 inches longer and 1½ inches wider than the usual size of the series.

Its greater bulk has apparently required the use of a strip of muslin to keep it firmly together. Apart from the minute number and date of issue on the cover there is no pretense that it is other than a book. In point of fact, it is thus set down in the Preface—"The several indexes with which the book is provided," etc. (p. iii).

No distinction can be made between these numbers and any other numbers of the series. Only in each of these cases its individuality as a book, so to speak, is more clearly marked. The distinction between such things and the issues of a periodical is more sharply emphasized. But if the publications with which we have heretofore dealt are properly parts of a periodical publication by reason of their periodical issuance from the press

and the printing of a name and number upon their covers, then these glaring and confessed books are also numbers of the same periodical publication and entitled to the same rates.

The result of this evasion of the statute becomes peculiarly evident. While the "First Reader" of any other publisher must pay postage at the rate of 1 cent for each 2 ounces, *The Riverside Primer and Reader*, by reason of the marks above mentioned, may pass at a cent a pound. While the song book of any other publisher must pay postage at the rate of 1 cent for each 2 ounces, *The Riverside Song Book* may pass at 1 cent per pound.

THIRD POINT.

Inasmuch as the sole distinguishing mark of the publications of the "Riverside Literature Series" from other books is that they are published under a collective name and are numbered when issued, their admission as mailable matter of the second class would involve the admission of any other books, however heterogeneous or dissimilar in purpose, character, or form, for which the device of a collective name and serial number may be adopted.

I. *The importance of this case lies not so much in the admission or exclusion of the Riverside Literature Series as in the fact that it will be controlling over a whole class.*

What the complainants are seeking by their bill, and what they obtained by the decree which the court of appeals reversed, amounts, in effect, to a judicial declaration that, in determining whether a publication is or is not a periodical, the Postmaster-General is concluded by the serial name and number.

This appears, both from the prayers of the bill and from the first paragraph of that decree, where it was adjudged—

> 1. That the complainants are entitled to have their *publications entitled "Riverside*

Literature Series" received and transmitted through the mails as mailable matter of the second class, as defined by the act of Congress approved March 3, 1879. (R., p. 13.)

It appears as well from the opinion of the learned justice, which accurately represents the contentions of the appellants, and may be fairly summarized thus:

The publications entitled the "Riverside Literature Series" appear periodically at stated intervals, as frequently as four times a year, from the known office of the complainants. They bear the date of the issue, and are numbered consecutively. They are formed of printed paper sheets, without substantial bindings, such as distinguish printed books for preservation from periodical publications. Therefore they are periodical publications.

Of all the characteristics thus stated, there is not one that may not be possessed by a book. Books may be issued periodically, at stated intervals, as frequently as four times a year, from a known office of publication. Books may bear the date of issue, and may be numbered consecutively. Books may be formed of printed paper sheets, without substantial binding, such as distinguish printed books for preservation from periodical publications. Unless we believe that the mere presence of a substantial binding makes a book, and the absence of substantial binding makes a periodical—which is absurd on its face—then the only thing that marks

out these publications from other books is the possession of a serial name and number.

That decision practically held that if a publication is presented to the Postmaster-General, and he finds that it is called some kind of a "Series," and the publications are to appear once a quarter, that is the conclusion of the whole matter.

For if, as was done in this case, the fact that the contents of each publication is literature is taken as the equivalent that the thing itself is *devoted* to literature, there is no kind of printed matter whatever that can not be said to come within the requirement of *devotion* to literature or to science, as the case may be. The requirement of a legitimate list of subscribers is likewise of no restraining force in this connection, for the news dealer or bookseller who undertakes to purchase so many thousand copies for resale over his counter or otherwise is unfortunately treated as a subscriber for the copies purchased. He might, with equal propriety, be regarded as a subscriber for the last popular novel, not published as a part of a series at all. But such is the recognized practice, and no point is made against these publications on that score. The facility with which a list of so-called subscribers may be got makes this condition no limitation at all.

The whole question comes back, then, to the distinguishing feature between publications confessedly books and publications which taken

singly are books but taken together are claimed to be a periodical. And this distinction is made by the appellants to rest upon the sole ground that all of the publications are called issues of such and such a series and are numbered consecutively.

What is the result? Any book which the publisher chooses to call an issue of his series becomes a number of a periodical publication, and jumps from the third to the second class.

The statute does not in terms require uniformity of size, shape, type, or form; it does indeed require that they shall be issues of a periodical publication, and if we are right in our view as to what a periodical publication really is, then some uniformity of size, shape, and form would be necessarily implied. But if the appellants are right in maintaining that formal compliance with section 14 is all that is necessary and that a serial name and number are conclusive signs of a periodical, then the possession of that serial name and number dispenses with any further requirement, and one issue may, with perfect propriety, be a quarto, another an octavo, and the third a duodecimo.

In illustration of this, we invite the attention of the court to certain publications which in the past have been received and admitted as constituting a periodical publication and so entitled to the second-class rates.

The first of these is the *Farm and Fireside Library*. No. 196, June, 1901, is *The New American Cook-Book*, duodecimo. No. 184, April, 1901, is *The Peerless Atlas of the World*, quarto; it is not to be distinguished from any other atlas that was ever published. No. 199, September, 1901, is a *Pictorial Natural History*, quarto. No. 179, January, 1900, is entitled *Our New Wonderlands, History and Description of our Philippine Wonderland*, 10 x 8. No. 189 is a book on *Horses*. Such are the things. Now, on the lower margin of the cover of each one of these books is found, in type almost imperceptible:

"Farm and Fireside Library. No. —, March, 1900. Published monthly by The Crowell and Kirkpatrick Company. Subscription price $3 per year."

Now, all of these are issued periodically at stated intervals as frequently as four times a year. They all bear the date of the issue. They are all numbered consecutively. They are all issued from a known office of publication. They are all formed of printed paper sheets, and they are all without board, cloth, leather, or other substantial binding such as distinguish printed books for preservation from periodical publications. They all, in the sense which we have already explained, probably had a list of subscribers. They, just as truly as the Riverside Literature Series, consist of information of a public character. In short, they comply literally with section 14.

Yet the woman who purchases the Cookbook purchases it as a cookbook, not as an issue of the *Farm and Fireside Library*. The man who buys the Horsebook buys it as a horsebook and not as an issue of the *Farm and Fireside Library*. And doubtless neither the man nor the woman is ever aware of the fiction that what she or he is buying is an issue of that "Library."

It requires a very subtle intellect to elude the conviction that these books, so grouped together, are nevertheless books, and that the designation of *Farm and Fireside Library* is a sham. Yet, if the separate and distinct publications of the "Riverside Literature Series" are a periodical publication, so is this a periodical publication. If the "Riverside Literature Series" is retained by the writ of this court in the second class of mailable matter, it must logically follow that the *Farm and Fireside Library*, and hundreds of others like it, duly excluded from that rate, must be readmitted.

Did time and space permit, a hundred illustrations, equally glaring, could be presented. Let us take only one or two more.

Text-book Series. English, German, and French. Published monthly.

Under this designation, during the twelve months ending November 30, 1887, there were published the following works—each a distinct, separate, complete legal text-book, for the most part unauthorized reprints of English works:

No. 1. Smith on Master and Servant.
No. 2. Challis on Real Property.
No. 3. De Colyar on Guaranty, Principal and Surety.
No. 4. Smith on Negligence.
No. 5. Blackburn on Sales.
No. 6. Pollock on Torts.
No. 7. Taylor on Evidence, Volume 1, Part 1.
No. 8. Taylor on Evidence, Volume 1, Part 2.
No. 9. Taylor on Evidence, Volume 2, Part 1.
No. 10. Taylor on Evidence, Volume 2, Part 2.
No. 11. Wright on Criminal Conspiracy.
No. 12. May on Fraudulent Conveyance.

Beyond the designation "Text-book Series" (which collocation discloses the peculiar value of the term "series," as a coating for the nauseous word *book*), there was no pretense that these law-books were other than books. In the public announcements they are so described:

> This series contains a collection of the freshest, most authoritative, and valuable text-books in the leading departments of the law. * * * All of the above books are ready for delivery.

But if the Postmaster-General is concluded by the term "series," by the monthly issuance from the press, by the number, and the printing of the date of issue, as the appellants insist, then we are unable to discover any reason why the "Text-book Series" is not likewise a periodical publication, as indeed the publishers were clever enough for a time to lead the Post-Office Department to believe.

Perhaps another illustration may be permitted us. On August 21, 1901, there appeared from a certain known office of publication in the city of New York, as No. 128, vol. 10, this work: "*The Trapped Tiger King; or, Dark Paul's Plot.*" The entire publication consists of a novel, or story, of the detective sort, complete in itself, not continued from any other issue, and unaccompanied by any other matter than its cover. So far it would undoubtedly be regarded as a book; but above the true title of the work there appears "The Deadwood Dick Library." And the "No. 128, vol. 10," indicates that one hundred and twenty-eight "Trapped Tiger Kings," or their equivalents, had been issued from the press of the publisher, above the title of each of which he had taken the precaution to print the words "The Deadwood Dick Library."

It would be tedious fully to illustrate the inevitable consequences of the appellant's contentions, by examples taken from the multitude of these so-called periodicals, happily heretofore excluded from the privileges of the second-class mail.

No better illustration of the consequence of holding the Riverside Literature Series to be a periodical can be found than the publications which are issued under library and serial names by the appellants in No. 481, *Smith* v. *Payne*. An inspection of the nine exhibits—one from each of the libraries or series involved in that suit—will show

that they possess each and every of the characteristics relied on to convert the publications of the Riverside Literature Series into a periodical. Yet we do not hesitate to assert that such an inspection will at the same time leave no doubt that these things are books and mailable matter of the third class. Two out of the list of libraries may perhaps suffice for illustration.

Let us take first the volume of the *Magnet Detective Library*. Here is a paper-bound volume of 217 pages. *Heard in the Dark, a Queer Tale*, by Nicholas Carter, author of "A Chance Discovery," "At the Knife's Point," "Lady Velvet," "A Game of Craft," "A Klondike Claim," "A Blow for Vengeance," etc. New York. Street & Smith, publishers, 238 William street. That is all that appears on the title-page, except a vignette, which, being highly significant, we are tempted to reproduce. It represents an owl behind an open book bearing the monogram "S & S" and standing upon a scroll bearing the simple imprint "NOVELS, Street & Smith. New York." Not a mark or sign anywhere that *Heard in the Dark* is in any respect different from any other novel that was ever published. Not a mark or sign that *Heard in the Dark* is a part of any periodical. Looking at the cover, however, we see that above the true designation of the book the publishers have printed in small type in the upper left-hand corner *Magnet Detective Library*, and in the upper right-hand corner, *No. 312*.

The person who purchases the volume at the dealer's or on the train doubtless buys it as *Heard in the Dark*, in blissful ignorance of even the meaning of this magical name and number. But on the back of the cover, on the very margin, we find, in very small type indeed—

MAGNET LIBRARY. A weekly publication devoted to Detective literature. No. 312. October 28, 1903.

This indicates that a week before October 28, 1903, Messrs. Street & Smith published another novel; about a week later than October 28, 1903, they will publish still another novel, and so on from week to week. These novels, taken separately, are books. If by any accident an ink blot should obscure from the view of the diligent postmaster the pearl-type statement on the margin of the back of the cover, even he would call it a book. But unless we are right in insisting that a periodical publication must be such in its natural and obvious sense, then Messrs. Street & Smith are clearly entitled to have their novels transported, unlike other novels, at the rate of 1 cent a pound. For they are issued (1) periodically, (2) at stated intervals, (3) as frequently as four times a year, (4) they bear a date of issue, (5) they are numbered consecutively, (6) they are issued from a known office of publication, (7) they are formed of printed paper sheets, (8) without board, cloth, leather or other substantial binding, (9) they had, we must suppose, in the form of dealers, a legitimate list of subscribers, (10) they are devoted, in the sense

claimed by our adversaries, to literature. Because, then, of the title—*Magnet Detective Library*—and because this is the *312th* volume which Messrs. Street & Smith have published, and because the 311 prior novels appeared as frequently as once a week, this novel is mailable at the rate of 1 cent a pound, while the same novel upon the back of which the serial name and number had been omitted must pay 1 cent for each 2 ounces.

The court may perhaps indulge us in one further illustration. It is from another of the Street & Smith Libraries—the *Columbia Library. Rube Burrough's League, or the Swamp Angels of Alabama*, by Marline Manly. In this case the title page is substantially similar to that in the case of the *Magnet Detective Library*, save that the publishers have taken the additional precaution to print over the title of the book: "Issued Weekly. By subscription, $5.00 per year. May 25, 1898. Entered as second-class matter at New York post-office." Observe that it is not stated what is issued weekly. So far the *Columbia Library* has not been mentioned. Neither is this particular volume given any number; but when we look at the back of the cover of *Rube Burrough's League* we find again, in small type:

COLUMBIA LIBRARY. A monthly publication devoted to good literature. By subscription $1.00 a year. January 1, 1901. No. 36. Entered as second-class matter at New York post-office.

The mask, however, is somewhat awry. The thing which, on the title page, is said to be issued weekly by subscription at $5 a year, is said on its

cover to be issued monthly at $1 a year. The thing which is said on the title page to have been issued on May 25, 1898, is said on the cover to be issued January 1, 1901. And now it is evident why the title page omitted to say anything either about the number of the issue or the name of the Library. When *Rube Burrough's League* was printed, it was printed without respect to any particular one of Street & Smith's Libraries. The publishers were then altogether undecided what Library designation they would use to carry it through the second-class mails. When the time came for putting on the cover which was to convert the novel into an issue of a periodical, the publishers printed a cover bearing the real title of the book and the Library name which at the moment seemed the most convenient. Unfortunately, this Library, the *Columbia*, turned out to be a monthly, whereas the book itself had already been imprinted in advance with the designation of a weekly. It appears then that these Library names are interchangeable. They are mere labels, which may be put on or taken off at will. Each of them is, as was alleged by the Postmaster-General's answer in this case—

> A mere device by means whereof the complainants have endeavored to disguise the true character of said books and to give them the appearance of a periodical publication for the purpose of obtaining for them the rates of postage designed for periodical publications.

II. *If the "Riverside Literature Series" is a periodical publication, then for the same reasons each of the libraries just described is a periodical publication. If the "Riverside Literature Series" is admitted, each of them must be admitted, and this is true of anything for which a serial name, however wide, may be invented.*

The illustrations which we have already given are merely types each of a large class, and they are by no means types of all the classes of publications which under the fiction of a collective name were formerly admitted to the second-class rates, but have now for some years been excluded from that class. Once admit that such a series constitutes a periodical publication, then there is absolutely no limit to the volumes which may be inserted into the series by the mere process of printing above their legitimate titles the title of the series.

If the Postmaster-General can not look below the surface of the cover, if he can not determine the existence or nonexistence of the thing of which these so-called issues are said to be parts, then any book published by any house in America may either be taken in under the cover of some serial name already in existence, or may be changed into the issue of a periodical by the addition of a newly invented serial name.

It is no extravagance to assert that, once admitting the contention of the appellants, under a single designation, such as "The Universal Library of Literature" or the like, the entire product of

the American press, reprints and all, might be transported at the second-class rate. Stripped of their cloth covers these books become periodicals. With their covers restored they again become books. Meanwhile, their transportation has been accomplished at a rate intended for the periodical literature of the country.

By a palpable device, invented for the very purpose, a few publishers will have succeeded in breaking down all distinction between the classes designated by Congress. There can be no good reason for employing all the resources of an artificial technical construction to accomplish so mischievous a purpose; there is no occasion to lift this mass of obvious books bodily into the second class.

Even if there were any doubt as to how to treat these books because they have adopted a disguising label (a doubt which we are unable to feel), it would have to be resolved against them.

This is not a case where a burden is to be laid on something already existing; but a case where something is being artificially created and devised for the purpose of reaping the benefit of a privilege intended for something else. We are not dealing here with a statute placing a burden upon the citizen, where any doubt as to the extent of the burden must be resolved in favor of the citizen. On the contrary, we are dealing with a governmental grant of a privilege or benefit, where any

doubt as to the extent of the privilege is to be resolved in favor of the Government.

Swan & Finch Co. v. *United States*, 190 U. S., 143, 146.

Hannibal, etc., Rd. Co. v. *Packet Co.*, 125 U. S., 260, 271.

The pound rate being such a grant of privilege, there is no reason why a thing essentially not entitled to the privilege, but colored for the purpose, should be elaborately construed into that privilege by reason of an artificial, fraudulent, or colorable device.

If it be suggested that these things by reason of this device possess to some extent the characteristics of both books and periodicals, the short answer is that the statute has plainly put books in the third class and that these things being books, can not be entitled to the special rate for periodicals simply because in addition to their real character they have been made technically to comply with certain special, additional, and superficial requirements which periodicals must also comply with. They can not belong to both classes. To take them out of their real class and place them in the other is to put a premium upon a miserable subterfuge.

III. *The question here is not the worth, literary merit, or moral quality of the publications. It is a question of whether they are or are not books.*

Much stress has been laid throughout this controversy upon the high character and literary value of the publications embraced within the "Riverside

Literature Series." It is said that all of these publications are "masterpieces of the most famous authors;" that they are "the soundest and purest literature of our English tongue," brought within "the reach of the poorest and humblest of our people."

All argument based upon the value and high standing of the "Riverside Literature Series" is wholly beside the mark. As we have already attempted to show, by the same token which admits them, all other books—good, bad, and indifferent—may be admitted. In point of fact, taking as a whole the multitude of books which, under the lax methods of other postal administrations, were admitted to the second class, the number which were worthy of consideration from a literary standpoint is an infinitesimal fraction of the whole. The greater part of the so-called libraries consist of fiction of the trashiest sort. Witness the nine libraries of the complainants in No. 481. A great number of them embrace the dime novels with which the imaginations of the youth were inflamed to the glorification of Jesse James and his compeers. The whole of the *Magnet Detective Library* involved in No. 481 is of that sort. This will appear sufficiently by the names of two or three consecutive volumes taken from the exhibits:

89. The Detective's Pretty Neighbor.
90. On the Rack.
91. The Great Money Order Swindle.
92. Van, the Government Detective.
93. Adventures of Harrison Keith, Detective.

But these considerations are wholly immaterial. The Postmaster-General would have no more right to admit the "Riverside Literature Series" on account of its literary value than he would have the right to exclude these publications on the ground of want of literary value. The question is, first and last, Are the things which it is sought to send at this rate the things contemplated by the act? Are they books, and so matter of the third class, or are they the issues of a continuous pe riodical publication, and so entitled to the second class?

In establishing the rate for "newspapers and other periodical publications" Congress was not seeking to discriminate between good literature and bad literature or to establish a censorship of the press with prizes for merit. The thing it had in mind was not the goodness or badness of the information disseminated, but the INSTRUMENTALITIES by which that dissemination might be accomplished. It was not thinking of all the accumulated stores of "sound and pure literature" in the vast libraries of the world, but it was thinking of how the mind of an inquiring and progressive people might be kept abreast of the times in all departments of human thought and activity. Congress did not stand hesitating between a good book and a bad newspaper.

Here we may notice the misunderstanding of our position into which the learned judge who first heard this case seems to have fallen. In

referring to the point made as to one so-called number of this series filed as an exhibit being nothing but the republication of one of Thackeray's novels, the learned judge seems to have understood that the objection lay in the book being old, or being English. He seems to have thought that our point was that such a republication is hostile to the interest of native living authors. But the point is not that the book is either old, or that it is English. The point is, that it is a book, and the fact that it is old and is English is only an additional and conclusive proof that it is a book. It is a book now, just as it was a book when first published. It is a book in America just as it was a book in England. It is a book when catalogued under the name of the Riverside Literature Series, just as it is a book when it is not so catalogued. It is a book with a cardboard cover, just as it is a book with a pasteboard cover.

All the circumstances as to the kind and nature of the publication are material only as showing whether or not it is a book. If, as is claimed for them, the publications of the "Riverside Literature Series" are "unabridged masterpieces of the best English and American authors," then we answer: Unabridged masterpieces of the best English and American authors thus published are books precisely as would be the unabridged drivel of the worst English and American authors.

FOURTH POINT.

The determination by the Postmaster-General that these publications are not periodicals but books is the determination of a matter of fact committed exclusively to his jurisdiction. Such finding therefore is final and conclusive.

Our argument so far has been directed to showing, *first*, that in classifying these publications as books and not as periodicals the Postmaster-General committed no error; and, *secondly*, that any other finding upon the facts of these cases must operate, if acted upon, to admit to the second class any other books, however heterogeneous or dissimilar in purpose, character, or form, for which the device of a collective name and serial number might be adopted.

Important as this matter is in respect to the large class of publications upon which a decision of these cases may be regarded as controlling, there lies beneath it a question of even greater interest to the administration of the Post-Office Department. Findings as to the proper class of matter offered for transmission through the mails are being made every day and amount in the aggregate to many thousand a year. In the single field of second-class matter alone, the cases arising each year merely upon the admission of new publications average 6,000. The following table will

show the magnitude of this administrative work, but it will, unfortunately, disclose no idea of the inexhaustible fertility of resource displayed by persons who naturally desire to get printed matter carried at 1 cent a pound rather than at 8:

Applications for entry as second-class matter.

Year.	Applications received.	Admitted.
1898	6,363	5,868
1899	5,552	5,048
1900	6,079	5,293
1901	6,966	4,985
1902	6,253	4,572

Upon what ground an applicant dissatisfied with the determination made by the Post-Office Department as to the true character and class of his particular mail matter may resort to the supreme court of the District of Columbia for a reexamination and review of that determination, and thus delay, interrupt, and impede the Department in the exercise of its ordinary functions, is obviously a matter of grave concern. It is most essential that both the Post-Office Department and the court below may have a clear conception of the nature and scope of their respective functions.

I. In approaching this question, let us say at the outset that we accept fully, freely, and without reservation everything that has been heretofore decided by this court as well as by the court of appeals in cases involving the postal service.

Especially do we take as the basis of our argument the decision of this court in the late case of *The American School of Magnetic Healing* v. *McAnnulty* (187 U. S., 94). We accept also, without reservation, what was decided by the court of appeals in the case of *Payne* v. *National Railway Publication Co.* (20 App. D. C., 581).

We concede that, as was decided in the McAnnulty case, the use of the mails is a positive legal right which can not be taken away by any action not justified by some law. We concede also that a citizen whose mail matter answers the description and fully complies with all the requirements of the statute governing a particular class of mail matter has a right to have it carried as such, and that the court may grant relief, by mandamus or otherwise, whenever the Postmaster-General refuses so to do arbitrarily, fraudulently, or upon some ground which has no basis in the statute.

But conceding all this, the question nevertheless remains: To whom is entrusted the duty of deter mining whether or not mail matter answers the description and complies with the requirements of the particular class? Our proposition on this point is simply that while the court may justly inquire whether the Postmaster-General has acted arbitrarily, fraudulently, or on some ground apart from or beyond the statute, it will not undertake to inquire whether in point of fact the things which he has found upon consideration of the facts not to meet that description and fulfill

those requirements do, in the judgment of the court, meet and fulfill them. In short, its office is not to determine whether these publications answer the requirements, but whether the Postmaster-General, in holding that they did not, was acting within the bounds of his statutory authority.

II. At the threshold of this discussion it may be observed:

First. That the duty of inquiring into and passing upon the character and class of mail matter is vested, as an executive function, in the Postmaster-General. *Second.* That neither the supreme court of the District of Columbia nor any other court is expressly authorized by law to reexamine or review his action in the premises. It follows that any review which may be lawfully made must, in the very nature of things, be collateral. In other words, the only power to review the acts of the Postmaster-General is that power which, since *Marbury* v. *Madison* and *Kendall* v. *Stokes*, has been exercised over executive officers in general according to the well known and comparatively simple formula of the law of mandamus. When we say mandamus, we include, of course, the correlative relief which, in similar cases, is granted by way of injunction. Now, that formula is nowhere more clearly or more accurately expressed than by Mr. Justice Brown, speaking for this court in *New Orleans* v. *Paine* (147 U. S., 261, 264):

> In *Noble* v. *Union River Logging Company*, decided at the present term (*ante*, 165), we had occasion to examine the question as to when a court was authorized to interfere by injunction with the action of the head of an executive department, and came to the conclusion that it was only where, *in any view of the facts that could be taken*, such action was beyond the scope of his authority.

In other words, such review, whether upon mandamus or injunction. is essentially jurisdictional, and will not lie for error. "The writ can never be used as a substitute for a writ of error."

> *Riverside Oil Co.* v. *Hitchcock*, 190 U. S., 316, 325.
> *Gaines* v. *Thompson*, 7 Wall., 347.
> *Dunlap* v. *Black*, 128 U. S., 40, 45.
> *Litchfield* v. *Richards*, 9 Wall., 575, 577.
> *In re Isaac L. Rice*, 155 U. S., 396, 403.

Our adversaries have apparently labored under the impression that in *American School of Magnetic Healing* v. *McAnnulty* (187 U. S., 94) this court had in some measure departed from the settled rule established by the cases just cited and a long line of others to the same effect. This is a complete misconception of this case. In the detailed examination which we shall presently make of it, it will appear that the principle upon which it was decided is precisely the same principle as that stated in *Noble* v. *Union River Logging Co.* and *New Orleans* v. *Paine*.

III.—The action of the Postmaster-General in these cases is, however, sought to be reversed upon mere grounds of error.

Now it seems to us quite plain that in so far as the classification of their publications as books is concerned, the appellants, one and all, challenge the action of the Postmaster-General upon mere grounds of error. It is not intimated that he has acted arbitrarily, capriciously, or in bad faith. It is conceded that his decision that these publications are books was made only "after notice to the complainants, a full, fair, and impartial hearing, and an inquiry into the facts relevant and material to the inquiry, an examination of evidence, and a construction of the law and the application thereof to the facts." (No. 372, *Houghton* v. *Payne*, Transc., pp. 9, 10.)

Upon this question—whether these publications are books and, therefore, mailable matter of the third class, under section 17, or issues of definite periodical publications—the court of appeals was so clear in its mind that it declined to pass upon the further inquiry touching the power of the court to supervise the determination of the Post-Office Department:

> "We think," said the court, "there is but one reasonable answer to this question, and that has been given by the Postmaster-General." (No. 372, *Houghton* v. *Payne*, Transc., 30.)

When, therefore, the appellants invoke this court to reexamine that question for itself and reach a

different conclusion, they are simply asking it to sit in review upon the supposed errors of the Postmaster-General. They are asking it to exercise a function which the office of Postmaster-General was created for the purpose of exercising, and to substitute their conclusions upon the facts for his conclusions. This, we submit, is precisely what this court has never done, and what it has in repeated cases steadily refused to do.

Whatever may be the power of the court to review an express construction of law made by an executive officer for the purpose of ascertaining whether such construction is within the reasonable purview of the statute under which he is acting, it is settled beyond dispute that all questions of fact upon which the action of the executive officer depends are for his consideration and judgment, and his decision thereon is final and conclusive.

Gardner v. *Bonestell*, 180 U. S., 362, 370.

The Japanese Immigrant case, 189 U. S., 86, 98.

Johnson v. *Drew*, 171 U. S., 93, 99.

Burfenning v. *Chicago, etc., Ry. Co.*, 163 U. S., 321, 323.

Smelting Company v. *Kent*, 104 U. S., 636, 640, 645.

IV. We do not think that it can be denied that the execution of the statute governing the classification of mail matter involves the determination of very real and, oftentimes, very complex questions of fact. It will be remembered that all

mail matter must be classified. Every single piece of it must be assigned to one of the four classes, and it can not be assigned to more than one. For illustration, all miscellaneous printed matter is matter of the third class. Merchandise is matter of the fourth class. Sample sheets of paper are obviously merchandise and matter of the fourth class. Yet the same sheets of paper once printed upon become matter of the third class. Now, let us suppose that a manufacturer of paper in sending out his sample sheets prints upon each of them: "This sheet is a sample of my best Ledger Bond No. 7. Price per ream, etc., is thus and so." Do these samples of merchandise by being so imprinted cease to be merchandise and become printed matter? And how is the character of such printed samples to be determined otherwise than as a plain inquiry of fact as to the real physical character of the thing itself? The difficulty and complexity of these questions of fact multiply when we come to the division between the second and third classes.

It has been well said that there is far greater probability of a correct use of terms than of a correct definition of them. Acting, doubtless, upon this principle, Congress, in the act of March 3, 1879, has, to a great extent, proceeded by mere enumeration and description. It has not attempted accurate definition of the vernacular words which it uses to denote the class of the physical objects with which it is dealing. It says, for

example, that matter of the third class shall embrace "books." But it does not say what is a book. It says matter of the second class shall embrace "newspapers and other periodical publications" which are published at certain intervals and within certain conditions. But it does not attempt to define either newspapers or periodical publications. For, it will not be forgotten that through the postal service the United States is engaged in transporting tangible objects which, for the purposes of that business, it grouped into certain classes according to their physical qualities. Congress was not dealing with abstract ideas. It was prescribing the rules which should govern the transaction of a business. The provisions of the law, therefore, were not couched in technical terms, having a precise legal connotation, but in simple words of common speech descriptive of common things. As we have already endeavored to show in the earlier sections of this brief, when it spoke of newspapers and periodicals on the one hand and books on the other, it spoke of things denoted by those words in their natural, ordinary, and common use, and the final determination whether the things actually presented answer the description of the statute is a question intrusted to the Postmaster-General as a part of his ordinary duties.

It will be observed that the general question of whether printed matter belongs to the book class or the periodical class involves a number of subsidiary

questions of fact. For example, it involves an inquiry as to whether a publication is "originated and published for the dissemination of information of a public character." This not only requires an inquiry into the original intent of the publisher and the extent to which that intent is maintained throughout the publication, but it also requires an inquiry as to the private or public character of the information proposed to be disseminated. The statute furnishes no guide as to what is information of a public character as distinguished from information of a private character. It uses the word "public" in its obvious and natural sense, and leaves the question as to whether any particular information is public to the determination of the Postmaster-General.

In like manner the statute requires that the Postmaster-General should determine whether the publication has a "legitimate list of subscribers." But the statute will be searched in vain for a definition of the term "legitimate list of subscribers," or for any rule or standard by which the legitimacy of such a list may be tested. Yet the existence of such a legitimate list is made an essential prerequisite to the enjoyment by any publication of the second-class rates. So long as any publication claims that privilege, the character of its list of subscribers in respect of the legitimacy is put and kept in issue.

The statute likewise denies the second-class mailing privileges to regular publications "de-

signed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates." But the statute furnishes no rule or standard as to what shall constitute a publication designed primarily for advertising purposes. The Postmaster-General is left to collect this primary design or intent just as a jury might be left to collect it from any evidence reasonably tending to establish it as a matter of fact. Whether the evidence does in point of fact establish an intent one way or another, he must necessarily conclude by the act and force of his own understanding. The same is true of the prohibition against a publication designed for free circulation or for circulation at nominal rates. Whether the rate charged for a particular publication is nominal or otherwise can not be other than a question of fact. It can not be determined by any rule or standard of law. And the same thing is true of free circulation. Whether a publication, notwithstanding the form in which a possibly gratuitous circulation may be veiled, is designed for free circulation or not would seem to be ascertainable only by drawing inferences of fact from evidence tending to disclose whether the persons receiving it did so without the payment of any real consideration.

All these inquiries are plain inquiries upon matters of fact. How, for instance, can a finding that a publication is "designed primarily for advertising purposes" be distinguished from the finding of the Department that the grantor of the plaintiff in

error was not a purchaser in good faith under the act of July 3, 1866, c. 219, in the case of *Gardner* v. *Bonestell* (180 U. S., 362, 370). Both of these findings must be findings of fact, and the conclusion of the Post-Office Department in the one can not be less final or conclusive than the conclusion of the Land Department in the other.

Nor are any of these findings by the Post-Office Department any less findings of fact than that of the Land Department, for example, in *Potter* v. *Hall* (189 U. S., 292, 300), where this court held that the determination by the Land Department that Potter had not, as a matter of fact, obtained by his previous going into Oklahoma Territory a *substantial advantage* over other persons in the race for lands "involved but the finding of an ultimate fact and not a conclusion of law?"

In passing upon these subsidiary questions, just as in passing upon the main and central question as to whether the publication is a book or an issue of a continuous, consistent periodical publication, the Postmaster-General is making an inquiry into the existence, reality, the truth of a matter of fact. He is simply seeking to determine upon the evidence of the things themselves, and of the circumstances surrounding them, the *rei veritas*. If the supreme court of the District of Columbia may review his finding that these things which the publishers, when they are not confronting the Post-Office Department, invariably call books, are in fact books, there seems no good reason why it

may not review his decision that the list of subscribers is not legitimate or that the publication is designed primarily for advertising purposes. In point of fact, a dozen cases involving those very questions are now pending in that court.

V. There is no conflict between these cases and Am. School Magnetic Healing v. McAnnulty.

We do not mean to say that the Postmaster-General can decide these things without evidence, or that he can read into the statute some requirement which is not there, and then use this superadded, nonstatutory requirement as a ground of exclusion. Neither do we say that if, in any view of the facts that can be taken, such facts wholly fail to support his conclusion, nevertheless his conclusion is binding. But we do say that if any unsupported view of the facts that can be taken does support his conclusion that conclusion is binding, although we ourselves might have come to a different one. And that is precisely the distinction between such a case as this and such a case as *Am. School of Mag. Healing* v. *McAnnulty*.

In that case the Postmaster-General, because he believed that magnetic healing was a fraud, had excluded from the mails all letters addressed to the complainants. But this court held that, upon the admitted facts, whether magnetic healing was a fraud could only be a matter of opinion, and therefore the case was simply not within the statute. The decision was put upon the express

ground that the facts stated in the complainant's bill, and admitted by the postmaster's demurrer, took the case entirely out of the scope of the statute prohibiting the obtaining of money through the mails by false pretenses—which was the statute under which the Postmaster-General had assumed to act. It will be observed that the postmaster's refusal to deliver the letters of the complainant was not defended on the ground that the business of the complainant as conducted was found in fact to have resulted in the obtaining of money under false pretenses. On the contrary, admitting to be true all that the complainants themselves had alleged as to the legitimate character of their business and their power through the proper exercise of the mind to treat and control particular diseases (which this court held to be allegations of fact and not conclusions of law), the postmaster's refusal was defended on the sole ground that the assertion of such a power must be, in the nature of things, a fraudulent pretense. It is obvious that such a defense upon such a record was self-destructive. Taking the undisputed and admitted facts averred in the bill and conceded by the answer, this court pointed out that whether the power of magnetic healing claimed by the complainants was a thing possible in nature could only be a mere matter of opinion.

> There is no exact standard of absolute truth by which to prove the assertion false and a fraud. We mean by that to say that

> the claim of the complainants can not be the subject of proof as of an ordinary fact; it can not be proved as a fact to be a fraud or false pretense or promise. (*Am. School of Mag. Healing* v. *McAnnulty*, 187 U. S., at p. 104.)

Therefore, those who assume to heal bodily infirmities by a resort to this method of cure can not be said to be guilty of obtaining money under false pretenses such as are intended in the statutes—

> "which," added the court, "evidently do not assume to deal with mere matters of opinion upon subjects which are not capable of proof as to their falsity." (*Ibid.*)

The claim of the ability to cure being, then, a mere matter of opinion not susceptible of proof or disproof—

> The efficacy of any special method is certainly not a matter for the decision of the Postmaster-General within these statutes relative to fraud. Unless the question may be reduced to one of fact as distinguished from mere opinion, we think these statutes can not be invoked for the purpose of stopping the delivery of mail matter. (*Id.*, 105, 106.)
>
> The facts, which are here admitted of record, show that the case is not one which by *any construction of those facts* is covered or provided for by the statutes under which the Postmaster-General has assumed to act. (*Id.*, 109.)

Having assumed an exercise of jurisdiction in a case not covered by the statute, his action is consequently void, and the detention by him of mail matter when the statutes have not granted him power so to order is consequently an invalid act.

We have here simply the reassertion of the doctrine that the court will control the action of the head of a Department where "in any view of the facts that could be taken such action was beyond the scope of his authority." (*New Orleans* v. *Paine*, 147 U. S., 261, 264.) In the *Magnetic Healing case* the question is stated to be simply whether the case was one "which by any construction of the facts is covered or provided for by the statutes under which the Postmaster-General has assumed to act." In short, it is a question of power. The Postmaster-General, in the *Magnetic case*, is denied the power simply because the facts before him in any view that might be taken of them, failed to show a violation of the law. In other words, upon the undisputed facts of the case there was no aspect of them whatever which could amount to a false or fraudulent pretense. If the truth or falsity of magnetic healing is not susceptible of proof as of an ordinary fact, but is a mere matter of opinion, then an order based upon its assumed falsity is without statutory basis and, as this court said, the statutes necessarily "do not as a matter of law cover the case." The Postmaster-General, having power only to decide whether a particular

business was a false pretense, could not extend that power to include cases where it was not possible to say whether or not there had been any false pretense. If the case was not covered by the statutes, he could not, by mere expression of opinion, bring it within the statute. This clearly appears by the summary of the case given by the court in *Riverside Oil Co.* v. *Hitchcock* (190 U. S., 316, 325).

> In the McAnnulty case it was held that the order of the Postmaster-General to the postmaster in the city of Nevada not to deliver the mail to the relator was not a justification for such refusal because the order was given without authority of law, and the postmaster could, notwithstanding such order, be compelled by mandamus to do his duty and deliver the mail.

But in the cases at bar we are dealing with an altogether different matter. We are not dealing with matters of mere opinion or with the possibility of obscure natural phenomena. We are dealing with tangible, visible, physical objects and with the meaning of plain, ordinary, and common language as applied to those objects. We are not dealing with a case where the thing to be determined "is not reducible to a question of fact as distinguished from mere opinion," or where the character of the thing "can not be proved as a fact." In the McAnnulty case, what the Postmaster-General attempted to do was something he

simply could not do because, as this court said, "there is no exact standard of absolute truth by which to prove the assertion false and a fraud;" the claim of the complainants "can not be proved as a fact to be a fraud or false pretense." In this case, on the contrary, the Postmaster-General is doing what he is compelled to do—to classify the things offered for mailing. Whether or not the physical objects offered for transmission at the second-class rates are books and third-class matter or periodicals and second-class matter must be determined. In that case the problem of magnetic healing was beyond the scope of the statute; in this case the problem of periodical *vel* book is necessarily within the statute. Whether it be done by the Postmaster-General or by this court, the publications called by the collective name of the "Riverside Literature Series" or the "Columbia Library" must, upon the evidence of their physical characteristics, be classified either as second or as third class matter. In that case the Postmaster-General simply attempted to do what he could not do—decide without evidence whether magnetic healing is possible. Here the Postmaster-General has only determined, upon evidence, something he was compelled to determine—whether these things are books.

VI. Counsel for appellants seem to be of the opinion that, because in determining whether things are periodicals or books, the Postmaster-General must use his powers of vision he is thereby

precluded from exercising his powers of inference. They insist that, because the physical features of the publications may be apprehended by any person who takes the trouble to inspect them, the Postmaster-General is stripped of the power to determine from a simple inspection what the things really are. Unfortunately for the appellants, that is precisely what the Postmaster-General was created to do. Now, a question of fact includes not only the ascertaining of the truth of the evidential facts, but also the inferences which are to be drawn from those facts as to the truth or falsity of the ultimate fact which is the subject of the inquiry. Here the ultimate fact to be determined is whether these things, masked under a serial name and number, are the issues of a periodical publication or really books. It is not merely within the power of the Postmaster-General, for example, to determine that No. 57, Extra Special No. K, February 18, 1893, *The Riverside Primer and Reader*, is described throughout by the publishers as a book, or that it contains so many pages in such and such type, that it has no connection or continuity with No. 56 or with No. 58, that it is not even of the same size or shape as the other so-called numbers, that all of the other supposed numbers are just as independent as such Extra Special number from the other separate wholes of which the series is made up, etc. But it is equally within his power to draw from those facts, together with all the other evidence in the case,

the inference that the thing is actually what the publishers call it, namely, a book. The evidence is surely susceptible of that inference, if, indeed, it is not altogether unsusceptible of any other inference. It is not because the physical facts are admitted or ascertainable beyond dispute that it is therefore for some other person to say what the Postmaster-General's decision upon them should be. The matter which is confided to the Postmaster-General is not the mere collection of evidence in order that someone else may draw the true inference from the facts, but it is for him to collect the evidence and to draw the necessary inference for himself. It does not follow that, because the chief facts in these cases appear by real evidence which is beyond dispute, the question to be determined by the Postmaster-General is reduced to a mere question of law, and may be reviewed upon an application of any dissatisfied applicant. The meaning and significance of those physical facts remains to be determined. It does not follow that, because the evidential facts are admitted, the functions of the Postmaster-General as to drawing inferences from them are altered.

If, as was said by this court in the case of *Potter* v. *Hall* (189 U. S., 293, 300), the facts found by the Postmaster-General had no tendency to sustain the conclusion reached by him, it might be that a question of law would arise; but such is not the case. If, as in the Magnetic Healing case, the facts taken in any aspect failed to establish the

conclusion reached by the Postmaster-General, then he would be finding something without any statutory basis therefor. He would not be acting within reason. He would be acting beyond and apart from the authority given him to act. But that is an altogether different matter from saying how much and what evidence will be sufficient to establish the ultimate fact, or from saying that, because the court may differ as to the inferences which it would have drawn from the evidential facts, it therefore has the power to correct the Postmaster-General's errors.

This distinction between refusing, on the one hand, to set aside a finding simply because one does not think it was reasonable to have come to it, and on the other hand, setting a finding aside because no reasonable person could have come to it is a familiar principle of wide application in the law. It is applied every day in reviewing verdicts of juries, and the principle upon which it proceeds is thus aptly stated by Brett, L. J.:

> Although they would not upon the same facts have come to the same conclusion to which the jury has come, yet they or he can not say but that reasonable and fair men might agree with the conclusions of the jury. Although they would not have arrived at the same conclusion, **IT IS NOT CONTRARY TO REASON TO HAVE ARRIVED AT IT.** (*Bridges* v. *Directors N. R. Co.*, L. R., 7, Eng. & Irish App., 221, 233.)

See also *Met. Ry. Co.* v. *Wright*, L. R., 11, App. Cas., 152; *Balt. & O. R. R. Co.* v. *Griffith*, 159 U. S., 603; *Marande* v. *Tex. & Pac. R. R. Co.*, 184 U. S., 173, 186.

Now, the functions of the Postmaster-General in dealing with the matters which come before his Department in the ordinary course of administration must be, at least, as wide as those of the jury in the determination of questions of fact that are commonly submitted to them. Only if it is contrary to reason to have arrived, upon the facts of these cases, at the conclusion which the court of appeals has said is the only reasonable conclusion, may the finding of the Postmaster-General properly be set aside.

VII.—There is no departmental regulation involved in these cases. The decision of the court of appeals is entirely consistant with the previous decision of the same court in Payne v. Nat. Ry. Pub. Co. (20 App., D. C., 501.)

Counsel for the appellants have found a conflict and contradiction between this case and *Payne* v. *Nat. Ry. Pub. Co.* (20 App., D. C., 581), which the court which decided both was unable to perceive. There is nothing in either of these cases that is in any sense inconsistent with the other. That case was a mandamus brought to require the transmission of a certain railway guide in the mails at the second-class rates, from which it had been excluded upon the express ground that it did not comply with a regulation of the Post-Office Department which, in the view of the court, made a

substantial addition to the requirements of the statute. The ground of decision upon which the court proceeded was thus clearly and expressly stated:

> It appears that the exclusion of the periodical from the mails is based *exclusively and in terms* upon its failure to comply with the superadded requirements of the postal regulation that it must "consist of current news." (20 App., D. C., at p. 600.)

This additional requirement—that the publication must consist of current news—the court expressly declared "is not the equivalent of information of a public character" (p. 598).

It was, therefore, in the opinion of the court, a manifest narrowing and restriction of the statute, and consequently void. The ground of exclusion from the second-class rate being based exclusively and in express terms upon failure to comply with the void regulation, was insufficient in law, and the relator was accordingly held entitled to the writ of mandamus for the enforcement of his right in the premises. (20 App., D. C., at p. 600.)

In other words, the action of the Post-Office Department being grounded on something outside of the statute which had no legal existence fell into the same class with the action condemned in the McAnnulty case. It was simply extra-statutory action. This would appear from that part of the

opinion in the Houghton case which restates the decision in the Nat. Ry. Pub. Co. case:

> Upon the practical admission, as apprehended by the court in that case, that the plaintiff had complied with the requirements of the statute itself and had been denied the admission of its publication to the mails as matter of the second class by virtue of the unauthorized regulation, it was held that the Postmaster-General owed it the performance of a simple duty, plainly imposed by the act of Congress and which was enforceable through the writ of mandamus. (No. 372, *Houghton* v. *Payne*, Rec., p. 29.)

But in the case at bar the ground of exclusion is not based upon any regulation. The answer states:

> And this defendant further says that said certificate of entry was not canceled, nor were the said publications refused admission to the second-class rate by reason of any matter, thing, principle, rule, or statement contained in the amendment to section 276 issued on July 17, 1901, but upon the sole ground that the said publications, by reason of the characteristics hereinbefore set out in the third paragraph of this answer, do not constitute a periodical publication within the intent and meaning of the act of March 3, 1879. That the said publications, and each and every of them, is a distinct and separate publication, complete in itself, not forming an integral part, issue, or number of a regular periodical, and each and every of them is within the intent and meaning of

the term "books, transient newspapers, and periodicals," as the same are employed in the said act to define and designate mailable matter of the third class: Miscellaneous printed matter. (Ans., par. 2, R., p. 10.)

The relegation of these publications from the second to the third class is not based upon the requirement of any regulation that the publication must contain "current news" which the court of appeals declared to be an unwarranted restriction of the term "information of a public character" in the statute. Nor is it based upon any requirement that it should contain "miscellaneous literary matter" which (as intimated but not decided by the court of appeals) would seem in their opinion to exclude periodicals devoted to science, the arts, or some special industry.

It is based squarely upon the ground that these publications having the characteristics of books, are books and belong to the third class. The matter was decided by the Postmaster-General, not upon any regulation, but, in accordance with his duty, simply by the direct application of the statute to the facts developed by the inquiry. The question before him was whether things having, as is stated in the answer and admitted by the replication, the characteristics of books, and being in fact books, might be transmuted into the issues of a periodical by the fraudulent device of a serial name and number. That question, we submit, has never before been the subject of any judical inquiry

in the court of appeals or elsewhere. No court has heretofore dealt with the meaning of the statute as applied directly to the subject-matter, nor has the power of the Postmaster-General to determine whether such things as these are in fact books been challenged in any other proceeding.

VIII.—There is no question here of denying the complainants the use and privilege of the mails. It is a mere question of the proper rate to which it should be subject.

These cases differ from cases like the *McAnnulty case* in another fundamental particular. The thing to be decided here is not whether a particular person is to be deprived of all use of the mails, or the use of that part of them which is a Government monopoly and the exclusion from which operates to bring about a practical excommunication—an absolute interdiction of all such business and social intercourse as depends upon written communication. What is being done here is simply charging the rate at which the things are to be carried in accordance with the real character of the thing carried. It is an administrative matter, pure and simple. Nobody is being excluded from the mails. Nor, we may add, if excluded, would such exclusion operate as a denial of transportation facilities, for transportation of matter of the second and third classes is that part of the postal service which Congress has never attempted, and supposedly does not possess the power, to make a monopoly.

Ex parte Jackson, 96 U. S., 727, 735.

The whole question is simply a question of rates. There can be no doubt that in these cases, as in the cases of all other matter offered for transmission, there must be at some time a decision as to the rates which it should properly pay. Nor can there be any doubt that, fundamentally, the determination must be made by the Postmaster-General. It is simply one of those ordinary administrative duties the performance of which involves at the most an inquiry into the existence of fact and an application to this of the statute governing the case. Whether it be as a question of fact, a mixed question of fact and law, or even as a question of law, can it be said that his determination in these cases is so clearly devoid of statutory basis as to be wholly null and void—so obviously beyond the scope of his authority as to terminate his jurisdiction?

Although we are entirely confident that a review of the action of the Postmaster-General in these cases based upon the special facts of each of them will demonstrate the soundness of his conclusions in respect thereof, we respectfully submit that, whether he erred or not, he erred, if at all, in the exercise of his lawful authority. As this court said in a late case wherein the Secretary of the Interior excluded as not being "vacant land open to settlement" under the lieu land act of June 4, 1897, land which the selector failed to deny was

either mineral in character or in the actual occupation of other persons:

> Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under these circumstances to review his determination by mandamus or injunction. (*Riverside Oil Co.* v. *Hitchcock*, 190 U. S., 316, 325.)

FIFTH POINT.

The Postmaster-General has the power and is under the duty to charge the legal rate upon all mail matter transmitted under his supervision. In the exercise of this power and duty he is not bound by any prior determination made by former Postmasters-General upon matter of similar character or published under the same name.

A. The question here is whether the Postmaster-General has the power to determine the character of the mail matter transmitted by him. This is a question of law as to the true nature of his function and can be in no wise affected by the belief of any Postmaster-General as to the existence of such power or by his failure to exercise it for administrative reasons.

At the threshold of this inquiry, we desire, in the interest of clearness, to remove a suggestion which has been much dwelt upon by counsel for the appellants. The question here is: Has each Postmaster-General power to determine the real character of the publications which he is called upon to transmit and to charge the legal rate accordingly? It is objected that several former Postmasters-General repeatedly intimated in their reports that they had no such power and appealed to Congress to revise the law. We may point out, however, that this objection is based upon a misconception of the facts.

I. *The requests for legislative assistance were not based upon a belief of want of power, but upon administrative difficulties.*

It is true that various Postmasters-General suggested to Congress the advisability of legislative relief against the second-class mail abuses. But this was not done on the theory either that the current misapplication of the law was correct or that the Postmaster-General had no power to apply it correctly. It was because of the magnitude of the abuse, the great number of publications improperly admitted, and the administrative difficulties in the way that they asked Congress to assist the Department by legislative enactment. Complaining, indeed, that the statutes lacked precision, they nevertheless dwelt upon the fact that publications of the sort represented by the "Riverside Literature Series" were "nothing but books pure and simple," and had crept gradually into the second class by a subterfuge. This appears distinctly from the annual report of Postmaster-General Bissell for 1894, frequently relied on as an admission of want of power. Even where the language used by the Postmaster-General is that the Department alone is powerless to remedy the evil, it is distinctly announced that these evils violate the plain intent, policy, and purpose of the law.

An examination of any or all of the reports of the Postmasters-General will show that their appeals to Congress were entirely due to adminis-

trative difficulties, and not to any conviction as to their want of legal power to properly classify the matter which they were being called upon to transmit. Postmaster-General Wanamaker, in particular, distinctly and strongly intimated that, although a more effective relief could be granted by Congress by a redefinition of its original intent, he was strongly inclined to put an end to the "book abuse" by reason of his own inherent power, without waiting for Congressional action.

The only difference between the former Postmasters-General and the Postmaster-General who brought about a return to the plain and natural meaning of the law was that the latter was less appalled by the quantity of work and the recognized difficulties in administration. What he saw was only what all the others had seen, but he possessed the courage and independence to carry their common views into action.

Even if it were true that one or more Postmasters-General had been under the impression that they did not possess full power to classify all mail matter which they were called upon to transport, such erroneous belief would be wholly immaterial. If the power exists in law, the belief of any particular incumbent of the office that he has not the power can not take it away. If he has the power, his thinking that he does not have it can not operate to take it away from him any more than his thinking that he has it can operate to give it to him. Neither can his failure to exercise

his lawful power because of such misconception, the administrative difficulties in the way, or anything else, impair in the slightest degree the normal authority of his successors. It is a question of legal power, and the belief of the individual Postmaster-General one way or another has nothing to do with the matter.

II. *Congress has never sanctioned the suggestion of a want of power in the Postmaster-General.*

Still less possible is it to base an argument upon the supposed acquiescence of Congress in the view that publications, copies of which were once carried at the second-class rate, however improperly, could not afterwards be relegated to their proper and lawful class. Congress has never acquiesced in that view. On the contrary, as we shall show in a moment, such action as it has taken in the premises has been in direct contradiction of it.

We are informed by counsel that Congress, knowing that these abuses existed, failed to correct them, and we are treated to a long extract from a certain speech of Mr. Cannon, wherein he gives, in 1888, his recollection of his understanding of the purpose of the law of 1879.

We can not refrain from expressing our surprise at this novel method of statutory construction.

While subsequent legislation *in pari materia* may sometimes be resorted to as expressing a constant Congressional purpose or intent, or as constituting a legislative construction of prior acts, we fail to see how any reasoning can be based upon the total

absence of legislative expression on the subject or how the void left by the silence of Congress may be filled with the expressions of individual members upon matters not enacted into law. We had supposed that expressions of individual opinion, even in debate upon bills enacted into law, could not be resorted to for a construction of the law enacted, but it would be stretching things pretty far to take the opinion of a member (1) upon a bill enacted ten years before, and (2) upon a bill which has never been enacted at all.

> There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body.
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> *United States* v. *Union Pac. R. Co.*, 91 U. S., 72, 79.
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> *Aldridge* v. *Williams*, 3 How., 9, 24.
>
> *Mitchell* v. *Grant*, etc., *Co.*, 2 Story, 648, 653.
>
> *Queen* v. *Hertford College*, 3 Q. B. D., 693, 707.
>
> The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of the legislative body that passed it by resorting to speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion,

by a resort to the history of the times when it was passed.

United States v. *Freight Assn.*, 166 U. S., 293, 318.

The reasoning which is here so well expressed is vividly illustrated by the very instance of Mr. Cannon's speech. Mr. Cannon spoke for nobody but himself, and, although the bill upon which he spoke passed the House, and may therefore be taken to be the sense of that body, Mr. Cannon was in the minority who voted against it.

If resort is to be made to the expressions of individual opinion, it would seem safer to resort to those of Mr. Blount, of the Post-Office Committee, who had charge of the bill on the floor.

> Mr. BLOUNT. Now, sir, it appears that under a construction of the statute in reference to second-class mail matter books are passing through the mails simply because they have paper covers on them. It is singular that such a construction should have been placed upon the statute in the light of the express declaration that books are to go at third-class rates. (Cong. Rec., vol. 19, p. 911.)

Again, speaking of this transmission of books as an abuse, Mr. Blount continued:

> This method of evading the law, begun in a small way, has continued to grow as one publication after another has discovered it and is now becoming very extensive.
>
> * * * * *

Mr. DINGLEY. If the gentleman will pardon me. The only object of this law, as I understand it, is to prevent evasions of existing law.

Mr. BLOUNT. That is it exactly.

Mr. DINGLEY. The law as it now stands was intended to put upon books the third-class rate, but certain publishers have succeeded in evading the law by omitting to put covers on particular classes of books and by sending them out as parts of one educational series.

Mr. BLOUNT. The gentleman states the matter accurately. The purpose of the bill is to discontinue the abuse that the gentleman describes.

At another debate, Mr. Griggs, of the Post-Office Committee, stated:

> Why, gentlemen, it was never intended in the beginning or at any time since the beginning to let books through the mails at pound rates.

And he added—apparently with the entire acquiescence of the House—

> Who questions that? (Cong. Rec., vol. 33, pt. 4, p. 3131.)

We respectfully submit that nothing can be gained by traveling through the Congressional Record and quoting the language used in debates on this subject. No argument can be drawn from legislative silence. The act of 1879 stood upon the statute book. It was there to be administered by

the Postmaster-General in accordance with its plain terms. In some instances those plain terms have been violated by what was called upon the floor of the House "a miserable subterfuge." It was the duty of whatever body was engaged in that business—whether Postmaster-General or court—to apply that meaning to the subject-matter. With that duty resting upon the Postmaster-General the inaction by Congress was entirely consistent with the pertinent inquiry which was put on the floor of the House:

> I speak of the abuse of sending these books and others through the mails. Why can not this abuse be corrected by an order of the Postmaster-General? (Cong. Rec., vol. 33, pt. 3, p. —.)

It is equally consistent with the declaration of Mr. Blount:

> There never was any statute which, properly construed, authorized the usage. (Cong. Rec., vol. 19, p. —.)

III. *Congress has expressly recognized and confirmed the existence of this power in the Postmaster-General.*

But when we come from Congressional inaction to Congressional action, we find that, so far from lending its sanction to the doctrine that each Postmaster-General has not the power to determine the true character of the publications which he is called upon to transport, Congress has recognized and confirmed that power in express words:

> When any publication has been accorded second-class mail privileges, the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested. (Act of March 3, 1901, 31 Stats. L., 1007.)

No clearer or more emphatic recognition of the continuing power to pass upon the character of such publications can be conceived.

The second-class mail privileges once accorded, this act distinctly declares, can be suspended and annulled, provided only that such suspension or annulment be made after a hearing. Not only the annulment of the privilege, but the very requirement of a hearing, necessarily implies the power and capacity to pass upon the character of the matter carried to determine whether or not it meets the description and complies with the conditions of the statute.

Of course we do not argue that this act of March 3, 1901, conferred any new power upon the Postmaster-General. The power inheres *ex necessatati rei* in the ordinary functions of that officer and his duty to charge the lawful rate for all matter carried. But if any doubt may be supposed to have existed on that score it is entirely removed by the act. Congress expressly recognized the privilege, once accorded, may, nevertheless, be both suspended and revoked. The only thing the statute requires is that there shall be a hearing. But whether it be the grant of a new power, or the creation of a

limitation upon an old power, the recognition of the power is equally clear.

And the limitation is simply that it shall be exercised only upon hearing. In all the cases at bar this hearing was granted. The limitation was fulfilled. (No. 372, *Houghton* v. *Payne*, p. 4, 9.)

It may be observed that the certificate of entry upon which the appellants rely in the Houghton case was made on September 15, 1900, and was expressed to be "Valid until revoked." It was following this certificate and the practice of the Department which it represented, and with full knowledge that second-class privileges so accorded were being revoked and annulled almost daily, that Congress passed the act in question. So far from staying the hand of the Postmaster-General and so far from saying to him: "These old mistakes must continue. These admissions are binding. You must not revoke or annul them. It is only we who can annul," Congress said distinctly: "Do your duty. Enforce compliance with the law. Determine the real character of the things which you are transmitting daily, but follow the ordinary principles of justice and fair play and accord to the parties interested the ordinary and usual right to a day in court."

Nor is this all that Congress has done in recognition of this continuing power and duty. When the exercise of this power to determine the character of these publications and relegate them to their proper class became the object of attack in

the courts, Congress made a special appropriation for the very purpose of defending that action in all suits pending or that might arise. (Act of Mar. 3, 1903, 32 Stats. L., p. 1174.) And we may be permitted to add that it is in pursuance of this express Congressional approval of the action of the Postmaster-General that the present counsel appear in these cases on behalf of the Postmaster-General.

Coming now to the real inquiry, the first question is: What is the power and duty of the Postmaster-General in respect of the application of the postal rates? As to this we affirm:

B. It is the duty of the Postmaster-General to classify mail matter offered to him for transmission and to charge upon all matter of the same kind the legal rate for that kind. He must, therefore, have the power to determine the real character of every pound of mail matter which he is called upon to transport.

A moment's consideration of the daily work of the Post-Office Department would seem to lead inevitably to this conclusion. If a publication, begun to-day, and printed to-day, and offered for transmission to-day, seeks to be admitted to one rate rather than to another—to the second-class rate rather than to the third-class rate—it is obviously the duty of the Postmaster-General to examine the publication, in the light of the law creating and governing those rates, and to determine upon all the facts of the case, both as to the time, place, and manner of publication, and as to the essential character of the thing itself,

whether in truth and in fact it be a periodical and entitled to the second-class, or a book and entitled to the third-class rate, and having so determined, his duty is to charge the legal rate accordingly. If this be his duty in respect of copies of a publication offered to-day for the first time, it is equally his duty in respect of copies of a publication offered to-day for the hundredth or the thousandth time. Otherwise we should have things substantially the same in fact passing through the mails at different rates. When the law says that matter of a certain kind shall be carried at one rate, and matter of another kind at another rate, it means that all matter of each kind shall be carried at the same rate. In a word, the rate is uniform; and it is the duty of the Postmaster-General to apply it uniformly.

The Postmaster-General, then, must have the power to determine the real character of every pound of mail matter which he is called upon to transport.

How, then, is this power proposed to be taken out of him? One should suppose that in order to strip him of what would appear to be his ordinary function it would be necessary to cite us to some distinct statutory limitation existing by express enactment, or at least by necessary implication. The appellants say that the present Postmaster-General is shorn of this power by reason of the fact that one of his predecessors charged a different rate upon matter of similar sort, believing it to belong to one class rather than the other, and the

reason they give for it is one which when analyzed is seen to be compounded of the following propositions: (1) Because the former admission is a binding determination upon the United States by the doctrine of *res judicata*. (2) Because the former construction of the statute supposed to be involved in the rating, however erroneous, is binding upon subsequent Postmasters-General. (3) Because the continuance of the publishing after such transmission in some way works an estoppel upon the United States.

Any one of these propositions, if conceded, would be sufficient to wreck our entire administrative system. The first is plainly inconsistent with the very office and functions of the Post-Office Department. The second and third have been presented to this court repeatedly and in various forms, and the court has never failed to reject them.

To the first of these propositions, then, we answer:

I. The action of one Postmaster-General in admitting publications to the second-class rate does not pass in rem judicatam or create any vested right in their continued admission at the same rate.

The argument of the appellants seems to be that if the Postmaster-General acted in a judicial rather than in a ministerial capacity in determining that the publications which he is carrying are not second-class matter, then the determination of his predecessor in the same capacity that copies

of publications which he was called upon to transport were second-class matter must have the force and effect of the final judgment of a court. But this is to ignore the continuous administrative function which the Postmaster-General is exercising and to create a supposed rule of law by a mere play upon the word "judicial."

In support of this proposition they have been able to produce but two cases: *United States* v. *Wright* (11 Wall., 648) and *Noble* v. *Union River L. Co.* (147 U. S., 165).

In *United States* v. *Wright* an act of Congress had provided that where the presence of a military force near a post-office increased the business of such post-office the Postmaster-General may, by special order, make a proportionate increased compensation to the postmaster. The postmaster had applied for such increase and his application had been rejected. Being sued for moneys payable by him to the United States, he pleaded as a set-off the increased compensation which, in his view, ought to have been allowed, but which was not in fact allowed. This court held simply that the court and jury were not to be permitted to pass upon the question of increased allowance and so *undo judicially* what the Postmaster-General had already done administratively.

"Congress," said the court, "constituted him the sole judge to determine not only whether the exigencies of the case had arisen, but if they had, the manner and extent of the allowance." In other

words, the decision of the Postmaster-General could not be reviewed in a court, because it was his business to make it, and not the court's.

So far from being an authority for the proposition of the appellants, *United States* v. *Wright* is simply another authority that it is not within the province of a court to review the action of the Postmaster-General in a matter confided to him, and because, if it had been the Postmaster-General it would have done otherwise—allow what he did not allow.

The transportation of mail matter is a present responsibility, a continuing administrative function, and not the vesting of a title. It consists merely in receiving, transporting, and delivering upon payment of the postage with which the particular matter is chargeable any mail matter which may from time to time be offered for transmission.

For this reason, cases like *Noble* v. *Union River L. Co.*, which hold that grants of patents for land can not be reviewed or recalled are not in point. Those cases stand upon reasons peculiar to the functions and proceedings of the Land Department. The settled doctrine of such cases is simply that where by patent, or some action of the Land Department equivalent to a patent, the title to public land which was formerly in the United States has definitively passed to an individual, any subsequent attempt to interfere with that title is simply an act wholly beyond the jurisdiction of that Department. It may, therefore, be restrained.

United States ex rel. McBride v. *Schurz*, 102 U. S., 277, 279.

Noble v. *Union River L. Co.*, 147 U. S., 175, 176, 177.

Warner Valley Stock Co. v. *Smith*, 9 App. D. C., 187.

Speaking of *Noble* v. *Union River L. Co.*, this court recently said:

> That was a case where the Executive Department had confessedly finally acted and then attempted to *resume jurisdiction*. (*Kirwan* v. *Murphy*, 189 U. S., 35, 56.)

On the contrary, so long as the legal title remains in the United States, all the duties of the Land Department respecting the land continue and its jurisdiction to determine all questions of law and fact is beyond judicial interference or control.

Brown v. *Hitchcock*, 173 U. S., 473.

New Orleans v. *Paine*, 147 U. S., 261.

It is altogether impossible to bring the classification of mail matter within the reason of these cases. There is no question here of resuming jurisdiction after the passing of title. No title passes. The jurisdiction to pass upon the character of each parcel of mail matter arises when it is offered, continues through its transmission, and ceases when it is delivered. A like jurisdiction arises with the next parcel offered, and so on, and so in every instance. The duty to carry and the corresponding power to classify and charge

are coexistent. Inasmuch as each Postmaster-General is called upon to transmit the successive parcels of matter as a part of his ordinary duties, it becomes incumbent upon him to determine whether or not in executing the law he can conscientiously say that the matter does in fact meet the description and comply with the conditions prescribed by law. A finding by one Postmaster-General that the matter which he is then carrying meets that description and fulfills those conditions does not transfer anything from the United States to the publishers. It is simply the rendition of a service for a stated consideration. It is not the admission by the Postmaster-General that confers the right to transportation at the statutory rates. The right of transmission is fixed by the statute, and the statute is at once the source and measure of the right. All that the Postmaster-General does is to determine whether the things which he is transporting correspond to that measure.

Now, the statute will be searched in vain for any indication that by transporting matter at a certain rate the Postmaster-General may vest in the publisher a right to have similar matter forever transported at the same rate. Observe the consequences of such a contention: If the appellants' argument on this point is valid at all, it is valid no matter how obviously erroneous and mistaken the transmission by the Postmaster-General may have been. According to the appellants' view that the judgment of the Postmaster-General is not only

binding as to the immediate transaction in respect of which it was made, but as to all future transactions, then no matter how plainly it might appear, not only to subsequent Postmasters-General but to courts as well, that the original Postmaster-General (who had perhaps transmitted but a dozen pounds of the matter) committed palpable and gross errors, no subsequent Postmaster-General and no court can afterwards prevent the future repetition throughout all time of the recurring loss occasioned by that palpable mistake.

The whole question for the officer transporting it is, then, Is it matter of the kind described? not Did somebody else once think other matter like it to be of the kind described? It is a question simply of the proper performance of a present duty—the conscientious discharge of a present obligation.

The same considerations dispose of the contention that may perhaps be hinged upon the certificate of entry. The certificate is a mere creature of departmental practice, having no analogy to a grant or patent.

The statute makes no provision for a certificate. Not only the terms of it but the certificate itself are an invention of the Department. It is gotten up as a matter of mere administrative convenience; a letter from the Third Assistant Postmaster-General to the local postmaster authorizing him to accept the issue of a certain periodical until further ordered would serve the same purpose. It

must be clear that a Postmaster-General can not, by an invention of his own, add anything to the statute, or by the use of couching his invention in any terms he pleases create any obligation on the part of the United States not created by the act itself, and thus paralyze the future functions of the Department.

In the Houghton case, however, the certificate of entry upon which the appellants rely expressly stated that it was only "Valid until revoked." (Rec., p. 3.)

II. The Postmaster-General is not bound to follow an erroneous construction placed upon a statute by his predecessor.

The appellees, practically confessing that the decision of one Postmaster-General as to the character of mailable matter transported by him is not an adjudication conclusive upon his successors, fall back to the proposition that if the decision is not *res judicata*, at least the construction of the statute supposed to be involved in the decision must be followed by the successor. And if the successor fails to follow it they say the courts have the power to compel him to follow it, and in doing so should themselves follow it.

This argument consists of three propositions, the mere statement of each of which seems to us to be its own refutation: (1) That the head of an Executive Department has not the same power as his predecessor to give a construction to an act which he is called upon to administer; (2) that the courts, if a statute be open to construction, are

controlled by a prior construction made by a Department; (3) that the courts have the power to impose their own construction of a statute upon the Executive Department charged with its administration.

To this we answer:

1. "*One head of an Executive Department has the same power as any other to give a construction to an act which relates to the business of his Department.*"

This was so expressly declared as long ago as the year 1833 by this court in *United States* v. *McDonald* (7 Pet., 114).

From the rule there laid down that court has never departed, and no authority or reason has yet been produced to show why it should depart. It is no exaggeration to say that if the contrary proposition, that the head of an executive department did not have the same power to construe the act which he is called upon to administer, was held, the whole machinery of governmental administration would be paralyzed. On this point we invite attention also to—

> *Wisconsin Central Railroad* v. *United States*, 164 U. S., 190–207.
>
> *United States* v. *Harmon*, 147 U. S., 268, and the cases there cited.

But the argument itself is suicidal. To say that the Postmaster-General *ought*, in deciding a matter, to follow the decision of his predecessor in a similar matter is to say, in the same breath, that he has the power to decide.

And the question here is, first and last, a question of power. If the Department has power to hear and determine the matter, of what avail is it to the appellees that the Department ought to have decided in a particular way? If the Postmaster-General has the power, it necessarily follows from the power that he is at liberty to decide for himself whether or not he will follow such construction. In construing a statute he is obviously exercising a quasi-judicial function. His discretion may and indeed ought to be influenced by reason and precedent, but it can not be coerced. In other words, the want of *res judicata* can not be made up by an appeal to the doctrine of *stare decisis*.

2. *In construing the statute, the courts are in no sense bound to follow a prior construction by an Executive Department.*

The appellants admit that if a statute "is so clear and explicit as not to be open to construction, the construction can not be changed by the practice of the Department." From this it is hoped to draw the conclusion that if the statute *is* open to construction the practice of the Department must be followed. If the statute is not open to construction it can not be construed. The principle, the force of which appellants wish to avoid by a seeming concession, is really this: Whenever a statute is before a court for construction, it is the function and duty of the court to construe it. If, after exercising its own powers of mind, the court still finds itself unable to

say what is a right construction, it will then give due consideration, and even great weight, to a contemporaneous departmental construction, provided, of course, that such departmental construction be consistent with the act. Nothing further than this was decided by *United States* v. *Alabama Railroad Co.* (142 U. S., 615). That suit was an appeal from the Court of Claims, where the railroad company had sued for moneys claimed to be due it for the transportation of mail under a former construction of the act, which moneys the Department, by the retroactive operation of a new construction, was attempting to deduct from present earnings. The court, being itself in doubt as to the true construction, adopted that which had been originally adopted by the Executive Department. But the strong reason—that the new construction of the Department was to be given a retroactive effect—which prevailed with the court in that case has no place in this. We are dealing here simply with future transactions. This is not an effort to take away from the complainants anything that they have already received by reason of the original erroneous construction.

There is nothing in that case or in any other case holding that a Postmaster-General, convinced of the manifest error of his predecessor's ruling, is nevertheless bound to follow it as to future recurring transactions against his own judgment. Nor is there anything which holds that a court should abdicate its own power to construe a statute and

accept a construction upon the credit of the first or any other executive officer.

Wisconsin Central Railroad v. *United States* (164 U. S., 190) is a clear authority to the contrary. And such has been the settled doctrine of the Supreme Court since *Decatur* v. *Paulding*, where it was said:

> If a suit should come before this court which involved a construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a Department.

The whole subject was reviewed in *Fairbanks* v. *United States* (181 U. S., 284, 308, 310). It is there established—

1. That the contemporaneous executive construction is to be considered only when the court is in doubt.

> Where there was no doubt, we have steadfastly declined to recognize any force in practical construction (at p. 311).

2. That the executive construction is in no sense controlling. The construction of the executive is, at the most, persuasive.

3. That the court must construe for itself. If, when it has done so, it has no further doubt, there is an end of the matter. If, on the contrary, the court finds itself still in doubt, it can attach to the executive construction such consideration as it is justly entitled to.

If the decision of this case demands a construction of the act of March 8, 1879, this court, we submit, will be able to reach one upon the plain terms of it.

3. *But whatever may be the view of the court as to the construction of the act, it does not follow that it has power to entertain a bill for the purpose of imposing that construction upon the Postmaster-General.*

While the courts must construe the acts of Congress whenever they are involved in cases properly before them, this does not confer the power to create a case for the very purpose of making and imposing such construction upon an executive officer. If the statute be one which requires construction for its proper administration, the construction is as much a part of his administrative duty as anything else.

In the performance of this duty of construction, involving as it does the exercise of judgment and discretion, the executive officer, so long as he acts within the scope of his authority, is free from interference and control. He must be beyond the scope of his authority before he is subject to such control. The mere circumstance that in some case the court would be at liberty, as well as under the duty, to construe the same statute is a wholly insufficient ground for assuming a jurisdiction for the purpose of imposing a construction. The construction can not be given except in a case in which jurisdiction is already present. To hold otherwise is to hold that courts

may sit in appeals from the whole administrative business of the Executive Departments and revise the judgment exercised by executive officers in the quasi-judicial duty of construing the statutes they are compelled to administer.

Certain land cases, like *Johnson* v. *Tousley* (13 Wallace, 72), have been relied on to show that there exists a judicial power to correct mistakes of law made by executive officers.

But it was settled in *Gaines* v. *Thompson* (7 Wall., 347, 353), and has been steadily followed since, that a court has no power to *review* the action of the Land Department and to reverse it because of an erroneous construction of law. Whenever the title to land has gone out of the United States and the jurisdiction of the Land Department terminated, then, whenever the title to that land comes in issue *inter partes* in a court of ordinary jurisdiction, that court, has the power to decree that A, to whom the land has been granted by reason of fraud or plain mistake of law, shall hold the title in trust for B, to whom, upon a proper construction of the law, the grant should have been made. (*Lee* v. *Johnson*, 116 U. S., 48, 49.)

In other words, the power of a court to nullify the construction of the Land Department arises from its jurisdiction over the case between the parties, and is incidental to its general power to pass upon the title, equitable or legal, of the respective claimants to land lying within the limits of its territorial jurisdiction. But there is no

general jurisdiction in any court to adjudicate mail rates. The question of mail rates can not arise in any suit between private parties. They are not the subjects of judicial cognizance either at law or in equity. They are a mere matter of administration which Congress has not seen fit to subject to judicial revision. (*In re Emblen*, 161 U. S., 57.)

III. The continued issuance of the complainant's publications after transmission as second-class matter can not estop the United States from ascertaining their true character and classifying them accordingly.

1. *It is settled law that no right not directly created by statute can arise against the United States by estoppel based upon the acts or conduct of its officers.*

If, as we have shown, the statute does not expressly or by necessary implication create a perpetual obligation on the United States to transport these publications at the same rate at which the first issue was transported, then the mistaken action of an executive officer can not have that effect. The executive officers of the United States exercise, as public agents, delegated powers by virtue of express statutory authority.

Floyd Acceptances, 7 Wall., 666.

Wisconsin Central R. R. v. *United States*, 164 U. S., 190–210.

United States v. *Kirkpatrick*, 9 Wheat., 727–735.

Their acts are consequently valid only within the strict limits of their authority. The acts and

declarations of public agents differ in this respect from the acts and declarations of private agents.

> Different rules in respect to acts and declarations of public agents and those which ordinarily govern in the case of mere private agents. Although a private agent, acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of a like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer for the mistakes of public officers or agents than to adopt a rule which through improper combinations or collusion might be turned to the detriment and injury of the public. (*Whiteside* v. *United States*, 93 U. S., 247–257.)

Inasmuch as the authority under which the officer acts is part of the law of the land, not only the officer but every person dealing with him is bound at his peril to take notice of the extent of the authority. Ignorance of the limits of his authority is mere ignorance of the law. (Floyd Acceptances, 7 Wall., 666–676.)

> Individuals, as well as courts, must take notice of the extent of authority conferred by law upon a person acting in an official capacity, and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act. (*Whiteside* v. *United States*, *ubi supra*.)

Everybody being thus charged with notice, nobody can in law be misled to his hurt by relying

upon the acts or conduct of an officer which are not within his authority. (*Hawkins* v. *United States*, 96 U. S., 689–691.)

And so, on the other hand, the United States can not be bound, either by the unauthorized acts of its agents or by the reliance of any person (everybody being, as we have seen, charged with notice), upon such unauthorized acts. It follows that no right not directly created by law can arise against the United States by estoppel based upon the conduct of its officers.

In order to find a legal basis for the supposed right of the complainants to continue the transmission of their publications at the second-class rate, we must look to the statutes themselves. As we have already seen, the statutes furnish no such basis. They indicate, on the contrary, that the admission of matter for transmission through the mails is a continuous administrative function to be performed by the Postmaster-General for the time being as a present responsibility.

2. *Assuming that an estoppel upon the United States could be created by the conduct of its officers, which we deny, there are no facts here upon which such an estoppel can be based.*

The complainants have had the full benefit of the mistaken admission to the second class for the sixteen years during which that mistaken admission continued. When relegated to the third class, to which they properly belong, they will not be in a worse position than before they were so mis-

takenly admitted. The only thing that really results is that in the future their publications will be excluded from a privilege to which they have no legal claim. No attempt is being made to recover back from them the difference between the rate they have actually paid and the true rate.

As for supposed contracts made upon the fact of the former admission, according to the very theory of complainants' bill, they have long since expired. If in point of fact the Riverside Literature Series ever possessed any yearly or even quarterly subscribers at all, on the basis of the old rate, all such subscriptions must have long since run out. On May 2, 1902, the publishers were informed that the Department had found these things to be books, chargeable at the third-class rate. The complainants have had nearly two years to adjust their prices.

Again, the supposed estoppel is not mutual. It therefore can not be an estoppel. There is no obligation on the part of the publishers to continue their publications, and they might in fact have been discontinued the next day after the transmission of the very first one.

The function of the Post-Office Department is simply to offer a service. Upon payment of the legal charge it will transport matter of a certain sort. The payment of the price and the transportation of the matter form the entire transaction, and when each is performed the transaction is at an end.

SIXTH POINT.

The prayers of these bills are wholly inconsistent with an administration of the postal laws.

The complainants pray that they may be declared to be entitled to have their publications entitled the "Riverside Literature Series" transmitted as mailable matter of the second class, and such was the decree reversed by the court of appeals.

This rests the right of transmission upon the mere name. But it must be obvious that the postal laws can not be administered if the Postmaster-General is required to transmit anything that happens to bear the designation "Riverside Literature Series."

The prayer as well as any decree founded upon it would strip the Postmaster-General of all power and authority, either to examine the contents of the bundles offered for transmission, or to pass upon the character of anything that publishers might thereafter see fit to present to the post-office marked "Riverside Literature Series."

We submit that this attempt to control the *future* business of the Post-Office Department can not be law. It is none the less error, because it results logically from the assumption of jurisdiction to pass upon the characteristics of mail matter hereafter to be carried.

THE ERROR WHICH RESULTS FROM THIS ASSUMPTION OF JURISDICTION IS EVEN MORE FULLY ILLUSTRATED BY THE BATES & GUILD CASE. THERE THE COMPLAINANTS, UPON THE PRESENTATION OF A SINGLE COPY OF A SO-CALLED PERIODICAL ISSUED ONLY ONCE AND FOR THE FIRST TIME, PRAY A PERPETUAL MANDATORY INJUNCTION COMPELLING THE POSTMASTER-GENERAL FOREVER TO TRANSMIT A PUBLICATION HAVING A CERTAIN NAME.

Transmit what? Anything that the publisher may hereafter print under that designation.

The major part of the publication consists plainly of sheet music, which all the world admits to be mailable matter of the third class. It is claimed to be, in the instance of this initial number, a periodical publication, because of the presence of critical comment, etc., to which the music is said to be subsidiary. We say, on the contrary, that it is not subsidiary. But, waiving that, what if in the next issue the critical comment is omitted? Shall the matter be carried at second-class rates because the publisher continues to use the name "Masters in Music?"

And even if the printed portion be not altogether omitted, but reduced to a single page, are all future numbers still to be carried, although it be admitted by everybody that the music is no longer subsidiary to the print but the print to the music? Yet under the terms of the decree prayed for, or indeed of any decree that might be granted in this case, it would be the duty of the Postmaster-General to

transmit whatever the publisher might see fit to include within two covers upon one of which was printed "Masters in Music."

Again, the statute requires that a publication to be entitled to pound rates must be printed as frequently as four times a year. While under the supervisory power of the Postmaster-General the first issue of a publication may properly be transmitted at the second-class rate, either upon a deposit or upon an understanding that the subsequent issues will appear, yet it is impossible for a court to decree, as a matter of law, that a publication which has been issued once is a publication which has been issued as frequently as four times a year. It can not be said that the mere assertion by the publisher that it *will* be published as often as four times a year gives him a right to transmit before the truth of that assertion can be adjudged by the office charged with the business. (*Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S., 301, 312.)

The point is not, that we contend that no periodical publication can be begun. The point is, that although it may be begun with the intention of maintaining it as a periodical publication published at least four times a year, and may so be accorded *pro hac vice* the second-class rate, yet in point of fact it may never be published a sufficient number of times to bring it within the law. Its admission meanwhile may be allowed as a matter of administration, subject to such safeguards as the Department may impose, and whenever there

is a break in the periodicity there is an administrative remedy. In this way no single number intended to be a book can be transported at the periodical rate.

THE PRAYERS OF THESE BILLS PLAINLY SHOW THE IMPOSSIBILITY OF THE POSTAL SERVICE BEING ADMINISTERED BY JUDICIAL PROCESS; FOR IF THE JUDGMENT OF THE POSTMASTER-GENERAL UPON A PARTICULAR PUBLICATION CAN BE REVIEWED AND REVERSED FOR ERROR BY A COURT OF EQUITY IN ONE CASE, THEN IT CAN BE SO REVIEWED AND REVERSED IN ALL CASES. A SUPERVISORY CONTROL OVER THE FUNCTIONS OF THE DEPARTMENT IS IMMEDIATELY CREATED.

In this matter of the classification of books and periodicals, the question is not a question of lopping off an excrescent act. The question is whether the court will undertake to pass upon the special features of each publication offered for transmission which the Postmaster-General does not think ought to be admitted. While far reaching in its effects, the "book abuse" is not the only attempt to defeat the meaning of this act. It would be impossible, without a personal inspection of the infinite variety of publications sought to be entered at this subsidized rate, to conceive of the minute shades which distinguish them one from another. *Masters in Music*, with its disguised musical sheets, is an illustration—only a minute portion of the administrative difficulty. From a genuine periodical, illustrated by pictures, the publication ran

down, by almost imperceptible stages, to sheets of architects' working drawings, intended for the draftsman's table and sought to be palmed off as second-class matter by a page of print prefixed for the purpose, and no other.

Again, there is the vast and allied problem of publications primarily designed for advertising, no fewer than ten cases involving which are now depending in the supreme court of the District.

If the principle be once established, then the supposed errors made in good faith in the decision of these applications can be reviewed and set aside by the courts; then every disappointed applicant will resort to the courts. A general supervisory control over the Post-Office Department is immediately created.

Such, we submit, is not the function of the court. Instead of confining itself to its proper duty, to see only that the limits of authority are not overstepped by the Department, it would in effect be overstepping its own limits and entering the sphere of ordering administrative action.

But here that is precisely what is asked to be done. The classification of mail matter offered for transmission is the administrative duty of the Postmaster-General. He is doing it every day and every hour of every day. In doing it he must necessarily apply the statute to its subject-matter, and, in the absence of any arbitrary, capricious, or extra-statutory action, to say to him that he

must apply it in one particular way rather than another is to take out of his hands the administration of his Department and place it in the hands of the court.

It is respectfully submitted that the decrees appealed from should be affirmed.

JOHN G. JOHNSON,
Special Assistant to the Attorney-General.
HENRY H. GLASSIE,
Special Assistant to the Attorney-General.

APPENDIX.

THE STATUTES.

SEC. 7. That mailable matter shall be divided into four classes:

First. Written matter.

Second. Periodical publications.

Third. Miscellaneous printed matter.

Fourth. Merchandise.

SEC. 8. Mailable matter of the first class shall embrace letters, postal cards, and all other matters wholly or partly in writing, except as hereinafter provided.

SEC. 10. That mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals and as frequently as four times a year and are within the conditions named in sections twelve and fourteen.

SEC. 12. That matter of the second class may be examined at the office of mailing, and if found to contain matter which is subject to a higher rate of postage such matter shall be charged with postage at the rate to which the inclosed matter is subject:

Provided, That nothing herein contained shall be so construed as to prohibit the insertion in periodicals of advertisements attached permanently to the same.

SEC. 14. That the conditions upon which a publication shall be admitted to the second class are as follows:

First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue and be numbered consecutively.

Second. It must be issued from a known office of publication.

Third. It must be formed of printed-paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.

Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers.

Provided, however, That nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.

SEC. 15. That foreign newspapers and other periodicals of the same general character as those admitted to the second class in the United States may, under the direction of the Postmaster-Genereral, on application of the publishers thereof or their agents, be transmitted through the mails at the same rates as if published in the United States.

Nothing in this act shall be so construed as to allow the transmission through the mails of any publication which violates any copyright granted by the United States.

SEC. 16. That publishers of matter of the second class may, without subjecting it to extra postage, fold within their regular issues a supplement; but in all cases the added matter must be germane to the publication which it supplements—that is to say, matter supplied in order to complete that to which it is added or supplemented, but omitted from the regular issue for want of space, time, or greater convenience, which supplement must in every case be issued with the publication.

SEC. 17. That mail matter of the third class shall embrace books, transient newspapers, and periodicals, circulars, and other matter wholly in print (not included in section twelve), proofs sheets, corrected proof sheets, and manuscript copy accompanying the same, and postage shall be paid at the rate of one cent for each two ounces or fractional part thereof, and shall fully be prepaid by postage stamps affixed to said matter.

Printed matter other than books received in the mails from foreign countries under the provisions of postal treaties or conventions shall be free of customs duty, and books which are admitted to the international mails exchanged under the provisions of the Universal Postal Union Convention may, when subject to customs duty, be delivered to addresses in the United States under such regulations for the collection of duties as may be agreed upon by the Secretary of the Treasury and the Postmaster-General.

SEC. 18. That the term "circular" is defined to be a printed letter, which, according to internal evidence, is being sent in identical terms to several persons. A circular shall not lose its character as such when the date and the name of the addressed

and of the sender shall be written therein, nor by the correction of mere typographical errors in writing.

SEC. 19. That "printed matter" within the intendment of this act is defined to be the reproduction upon paper, by any process except that of handwriting, of any words, letters, characters, figures, or images, or of any combination thereof not having the character of an actual and personal correspondence.

SEC. 20. That mailable matter of the fourth class shall embrace all matter not embraced in the first, second, or third class, which is not in its form or nature liable to destroy, deface, or otherwise damage the contents of the mail bag, or harm the person of anyone engaged in the postal service, and is not above the weight provided by law, which is hereby declared to be not exceeding four pounds for each package thereof, except in case of single books weighing in excess of that amount, and except for books and documents published or circulated by order of Congress, or official matter emanating from any of the departments of the Government or from the Smithsonian Institution, or which is not declared nonmailable under the provision of section thirty-eight hundred and ninety-three (4) of the Revised Statutes as amended by the act of July twelfth, eighteen hundred and seventy-six (5), or matter appertaining to lotteries, gifts concerts, or fraudulent schemes or devices.

SEC. 22. That mailable matter of the second class shall contain no writing, print, mark, or sign thereon or therein in addition to the original print, except as herein provided, to wit, the name and address of the person to whom the matter shall be

sent, and index figures of subscription book, either written or printed, the printed title of the publication, the printed name and address of the publisher or sender of the same, and written or printed words or figures, or both, indicating the date on which the subscription to such matter will end.

Upon matter of the third class, or upon the wrapper inclosing the same, the sender may write his own name or address thereon, with the word "from" above and preceding the same, and in either case may make simple marks intended to designate a word or passage of the text to which it is desired to call attention.

There may be placed upon the cover or blank leaves of any book or of any printed matter of the third class a simple manuscript dedication or inscription that does not partake of the nature of a personal correspondence.

Upon any package of matter of the fourth class the sender may write or print his own name and address, preceded by the word "from," and there may also be written or printed the number and names of the articles inclosed.

And the sender thereof may write or print upon or attach to any such articles by tag or label, a mark, number, name, or letter, for purpose of identification.

SEC. 25. That publications of the second class, one copy to each actual subscriber residing in the county where the same are printed, in whole or in part, and published, shall go free through the mails; but the same shall not be delivered at letter-carrier offices, or distributed by carriers,

unless postage is paid thereon at the rate prescribed in section thirteen (6) of this act;

Provided, That the rate of postage on newspapers, excepting weeklies, and periodicals not exceeding two ounces in weight, when the same are deposited in a letter-carrier office for delivery by its carriers, shall be uniform at one cent each.

Periodicals weighing more than two ounces shall be subject, when delivered by such carriers, to a postage of two cents each, and these rates shall be prepaid by stamps affixed. (Act of March 3, 1879; 1 Supp., R. S., p. 246.)

"(Par. 4.) That upon all matter of the first class, as defined by chapter one hundred and eighty of the laws of Congress approved March third, eighteen hundred and seventy-nine, entitled 'An act making appropriations for the service of the Post-Office Department for the fiscal year ending June thirtieth, eighteen hundred and eighty, and for other purposes,' and by that act declared subject to postage at the rate of three cents for each half ounce or fraction thereof, and reduced by the act of March third, eighteen hundred and eighty-three, to two cents for each half ounce or fraction thereof, postage shall be charged, on and after the first day of July, eighteen hundred and eighty-five, at the rate of two cents for each ounce or fraction thereof.

"And drop letters shall be mailed at the rate of two cents per ounce or fraction thereof, including delivery at letter-carrier offices, and one cent for each ounce or fraction thereof where free delivery by carrier is not established.

"That all publications of the second class, except as provided in section twenty-five of said act,

when sent by the publisher thereof, and from the office of publication, including sample copies, or when sent from a news agency to actual subscribers thereto, or to other news agents, shall, on and after July first, eighteen hundred and eighty-five, be entitled to transmission through the mails at one cent a pound or a fraction thereof, such postage to be prepaid as now provided by law.

"And any article or item in any newspaper or other publication may be marked for observation, except by written or printed words, without increase of postage."

(Act of March 3, 1885; 1 Supp., p. 483.)

"SEC. 6. That on and after the first day of January, eighteen hundred and seventy-five, upon the receipt of such newspapers and periodical publications at the office of mailing, they shall be weighed in bulk and postage paid thereon by a special adhesive stamp, to be devised and furnished by the Postmaster-General, which shall be affixed to such matter, or to the sack containing the same, or upon a memorandum of such mailing, or otherwise, as the Postmaster-General may, from time to time, provide by regulation."

(Act of June 23, 1874; 18 Stat., 233.)

"* * * Postage on second-class matter mailed shall be collected and accounted for under such regulations as the Postmaster-General may prescribe."

(Act of June 13, 1898, ch. 446, 2 Supp., 778.)

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Supreme Court of the United States.

No. 372.—October Term, 1903.

Henry O. Houghton, Trustee, et al., Appellants, vs. Henry C. Payne, Postmaster General. } On appeal from the Court of Appeals of the District of Columbia.

[April 11, 1904.]

This was a bill in equity originally filed in the Supreme Court of the District of Columbia by the firm of Houghton, Mifflin & Co., against the Postmaster General, praying that a certain publication, known as The Riverside Literature Series, be entered and transmitted through the mails as second class mail matter, and for an injunction to restrain the cancellation of a certain certificate of entry, previously issued, allowing such transmission.

The answer denied that the Riverside Literature Series constituted a periodical within the meaning and intent of the statute; that, although complying with the external characteristics and conditions of second class mail matter, nevertheless, internally and in substance, they have not the characteristics of second-class matter, but have the peculiarities of books, and are in fact books.

The case was heard upon the pleadings and an exhibit of the series, and a decree rendered in accordance with the prayer of the bill. (31 Wash. L. Rep. 178.) An appeal was taken to the Court of Appeals of the District of Columbia, which reversed the decree of the Supreme Court and dismissed the bill. (31 Wash. L. Rep. 390.)

Mr. Justice Brown delivered the opinion of the Court.

This case depends upon the construction of the following sections of the Post Office appropriation bill of March 3, 1879, (20 Stat. 355, 358):

"Sec. 7. Mailable matter shall be divided into four classes:
First. Written matter;
Second. Periodical publications;
Third. Miscellaneous printed matter;
Fourth. Merchandise."

Matter of the second class is thus described:

"Sec. 10. That mailable matter of the second class shall embrace all newspapers and all other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within the conditions named in sections twelve and fourteen.

"SEC. 11. Publications of the second class (except as provided in section 25) shall be entitled to transmission through the mails at two cents a pound or fraction thereof.

"SEC. 12. That the matter of the second class may be examined at the office of mailing, and if found to contain matter which is subject to a higher rate of postage such matter shall be charged with postage at the rate to which the enclosed matter is subject:

"*Provided*, That nothing herein contained shall be construed as to prohibit the insertion in periodicals of advertisements attached permanently to the same."

"SEC. 14. That the conditions upon which a publication shall be admitted to the second class are as follows:

"First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.

"Second. It must be issued from a known office of publication.

"Third. It must be formed of printed paper sheets, without board, cloth, leather or other substantial binding, such as distinguish printed books for preservation from periodical publications.

"Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry, and having a legitimate list of subscribers:

"*Provided, however*, That nothing herein contained shall be so construed as to admit to the second class rate regular publications, designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

And by the act of March 3, 1885, (23 Stat. 385,) it was provided that second class matter (saving that excepted in section 25) shall, on and after June 1, 1885, be entitled to transmission through the mails at one cent a pound or fraction thereof.

Section 17 declared that mail matter of the third class shall embrace books, transient newspapers and periodicals, circulars, &c., and postage shall be paid at the rate of one cent for each two ounces or fractional part thereof.

Are the publications of the Riverside Literature Series periodicals, and therefore, belonging to the second class of mail matter, and entitled to transmission at the rate of one cent a pound; or books, as designated in the third class, and subject to postage at the rate of one cent for each two ounces?

The publications are small books, 4½ by 7 inches, in paper covers, and are issued from the office of publication either monthly or quarterly, and numbered consecutively. Each number contains a single novel or story, or a collection of short stories or poems by the same author, and most, if not all of them, are reprints of standard works by Thackeray, Whittier, Lowell, Emerson, Irving, or other well known writers, and from a literary point of view are of a high class. Each number is complete in itself and entirely disconnected with every other number. Upon the front page of the cover appears, at the top, the words "Issued Monthly," followed by the num

ber of the serial and the date of issue. Below, the words "Riverside Literature Series" are prominently displayed, and in the center of the page appears the name of the book. Each number complies with the conditions of section 14, upon which the publication may be admitted to the second class, namely, it is regularly issued at stated intervals, at least quarterly, and bears a date of issue and is consecutively numbered. It is issued from a known office of publication; is formed of printed paper sheets, without board, cloth or leather, or other substantial binding, and is published for the dissemination of information of a public character; or devoted to literature, &c. The bill also avers that the series has a legitimate list of subscribers, but does not aver that they were reading subscribers in the ordinary sense of the term. This distinction, however, is not pressed by the Government. If the fact be that this series becomes a periodical by a compliance with the conditions of section 14, under which it is entitled to be transmitted as second class mail matter, we shall be compelled to say that the decree of the court below was wrong.

But while section 14 lays down certain conditions requisite to the admission of a publication as to mail matter of the second class, it does not define a periodical, or declare that upon compliance with these conditions the publication shall be deemed such. In other words, it defines certain requisites of a periodical, but does not declare that they shall be the only requisites. Under section 10 the publication must be a "periodical publication," which means, we think, that it shall not only have the feature of periodicity, but that it shall be a periodical in the ordinary meaning of the term. A periodical is defined by Webster as "a magazine or other publication which appears at stated or regular intervals," and by the Century Dictionary as "a publication issued at regular intervals in successive numbers or parts, each of which (properly) contains matter on a variety of topics and no one of which is contemplated as forming a book of itself." By section 10 newspapers are included within the class of periodical publications, although they are not so regarded in common speech. By far the largest class of periodicals are magazines, which are defined by Webster as "pamphlets published periodically, containing miscellaneous papers or compositions." A few other nondescript publications, such as railway guides, appearing at stated intervals, have been treated as periodicals and entitled to the privileges of second class mail matter. (*Payne* v. *Railway Pub. Co.*, 20 D. C. App. 581.) Publications other than newspapers and periodicals are treated as miscellaneous printed matter falling within the third class.

While it may be difficult to draw an exact line of demarkation between periodicals and books, within which latter class the Riverside Literature Series falls, if not a periodical, it is usually, though not always, easy to determine within which category it falls, if the character of a particular publication be put in issue.

A periodical, as ordinarily understood, is a publication appearing at stated intervals, each number of which contains a variety of original articles by different authors, devoted either to general literature or some special branch of learning or to a special class of subjects. Ordinarily each number is incomplete in itself, and indicates a relation with prior or subsequent numbers of the same series. It implies a continuity of literary character, a connection between the different numbers of the series in the nature of the articles appearing in them, whether they be successive chapters of the same story or novel or essays upon subjects pertaining to general literature. If, for instance, one number were devoted to law, another to medicine, another to religion, another to music, another to painting, &c., the publication could not be considered as a periodical, as there is no connection between the subjects and no literary continuity. It could scarcely be supposed that ordinary readers would subscribe to a publication devoted to such an extensive range of subjects.

A book is readily distinguishable from a periodical, not only because it usually has a more substantial binding, (although this is by no means essential,) but in the fact that it ordinarily contains a story, essay or poem, or a collection of such, by the same author, although even this is by no means universal, as books frequently contain articles by different authors. Books are not often issued periodically, and, if so, their periodicity is not an element of their character. The reason why books of the Riverside Literature Series are issued periodically is too palpable to require comment or explanation. It is sufficient to observe that, in our opinion, the fact that a publication is issued at stated intervals, under a collective name, does not necessarily make it a periodical. Were it not for the fact that they are so issued in consecutive numbers, no one would imagine for a moment that these publications were periodicals and not books. While this fact may be entitled to weight in determining the character of the publication, it is by no means conclusive, when all their other characteristics are those of books rather than those of magazines.

The fact that these publications are not bound when issued or intended for preservation, is immaterial, since in France and most of the Continental countries nearly all books, even of the most serious and permanent character, are usually issued in paper covers, thus leaving each purchaser to determine for himself whether they are worth a binding of more substantial character and preservation in his library. It is true that in this subdivision of section 14 it is said that a periodical must be without such substantial binding as to distinguish printed books for preservation from periodical publications, but it is by no means to be inferred from this that to constitute a book the publication must have a substantial binding.

Great stress is laid by counsel upon the original interpretation of the term "periodical," as applied to these books, which it is said was con-

tinued without change under different administrations and by several successive Postmasters General, and from 1879, the date of the passage of the act, until 1902, when the certificates granted by the former Postmasters General were revoked by the defendant and a different classification made of the publications now in issue, that the attention of Congress was repeatedly called to the evils and to the large expense incurred by the government by the admission of publications of this description to mail matter of the second classs; that Congress seriously considered these representations, and committees made voluminous reports thereon, yet Congress persistently refused to change by legislation the ruling of the Postmasters General in that regard.

We had occasion to consider this subject at length in the case of the *United States* v. *Alabama R. R. Co.*, (142 U. S. 615, 621,) in which we held that this court would look with disfavor upon a change whereby parties who have contracted with the government on the faith of a former construction might be injured; especially when it is attempted to make the change retroactive, and to require from a contractor a return of moneys paid to him under the former construction. This case is not open to the same objections. No contract with the government is set up whereby the latter agreed to carry these publications as second class mail matter. Much less is any repayment demanded of money paid by the government under the prior construction. The action of the government consists merely in the revocation of a certificate or license admitting these publications as mail matter of the second class. No vested right having been created by such certificate, no contract can be said to be impaired by its revocation. (*Salt Co.* v. *East Saginaw*, 13 Wall. 373; *Grand Lodge* v. *New Orleans*, 166 U. S. 143, 147.) It was said, in that case, that the construction is one which, though inconsistent with the literalism of the act, certainly consorted with the equities of the case. Whereas in the case under consideration, if we are to believe the statements of counsel, which are not denied, the carriage of these publications as second class mail matter entails annually an enormous loss upon the government and constitutes an odious discrimination between publishers of books and publishers of the so-called periodicals.

But in addition to these considerations it is well settled that it is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction. (*United States* v. *Graham*, 110 U. S. 219; *United States* v. *Finnell*, 185 U. S. 235.) A custom of the department, however, long continued by successive officers, must yield to the positive language of the statute. As was said in the Graham case (p. 221), "if there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controll-

Contemporaneous construction is a rule of interpretation, but is not an absolute one. It does not preclude an inquiry by the Court as to the original correctness of such construction

ing, in its effect. But with the language clear and precise and with its meaning evident there is no room for construction and consequently no need of anything to give it aid. The cases to this effect are numerous. (*Edwards' Lessee* v. *Darby*, 12 Wheat. 206; *United States* v. *Temple*, 105 U. S. 97; *Swift Co.* v. *United States*, 105 U. S. 691; *Riggles* v. *Illinois*, 108 U. S. 526.)" While it might well happen that by reason of the relative unimportance of the question when originally raised a too liberal construction might have been given to the word periodical, we cannot think that if this question had been raised for the first time after second class mail matter had obtained its present proportions, a like construction would have been given. Some consideration in connection with the revocation of these certificates may properly be accorded to the great expense occasioned by this interpretation, and the discrimination in favor of certain publishers and against others, to which allusion has already been made. We regard publications of the Riverside Literature Series as too clearly within the denomination of books to justify us in approving a classification of them as periodicals, notwithstanding the length of time such classification obtained, and we are therefore of opinion that the judgment of the Court of Appeals was correct, and it is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 481.—October Term, 1903.

Ormond G. Smith et al., Appellants, vs. Henry C. Payne, Postmaster General. } Appeal from the Court of Appeals of the District of Columbia.

[April 11, 1904.]

This was also a bill, filed by the firm of Street & Smith, to enjoin the Postmaster General from cancelling certain certificates of entry admitting the publications of complainant firm to the mail as second class mail matter. This case took the same course as the preceding one.

Mr. Justice Brown delivered the opinion of the Court.

Plaintiffs are the publishers of several different series of novels under the names of The Columbia Library, The Bertha Clay Library, The Magnet Detective Library, The Medal Library, The Undine Library, The Eden Series, The Arrow Library, and some others. The books of these series are apparently of an inferior class of literature, and are numbered consecutively; but the only thing to indicate that they are issued periodically is a notice upon the outside of the back cover in small type that they are weekly or semi-monthly publications.

The considerations moving us to affirm the decree of the Court of Appeals in the case of *Houghton* v. *Payne*, just decided, apply with much greater persuasiveness to this case, and the decree dismissing the bill is, therefore,

Affirmed.

Mr. Justice Harlan and the Chief Justice dissent in this case for the reasons stated in their dissenting opinions in *Houghton* v. *Payne* and *Bates & Guild Co.* v. *Payne*.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 372.—October Term, 1903.

Henry O. Houghton, Trustee, &c., Appellant, vs. Henry C. Payne, Postmaster General. } Appeal from the Court of Appeals of the District of Columbia.

[April 11th 1904.]

Mr. Justice Harlan (with whom concurred the Chief Justice) dissenting.

The Chief Justice and myself are unable to concur in the opinion of the court.

It was admitted at the bar that for more than sixteen years prior to May 5th 1902 the Post Office Department had acted upon the identical construction of the statute for which the appellants contend. During that period many different Postmasters General asked Congress to amend the statute so as to exclude from the mails, as second class matter, such publications as those issued by the appellant, and which, under the present ruling of the Department, are declared not to belong to that class of mailable matter. Again and again Congress refused to so amend the statute, although earnestly urged by the Department to do so.

Representative Cannon, now Speaker of the House of Representatives, in a speech in opposition to the proposed change of the statute, explained the reasons that induced Congress to pass the act of March 3d 1879, *c.* 180, *R. S. Supp.* 454. He said: "Before speaking on the merits of this bill, I wish to say to the gentleman from Georgia that, according to my recollection, by legislation advisedly had, prior to 1879, while I was a member of the Committee on the Post Office and Post Roads, this class of literature was allowed to pass through the mails, the policy of that legislation being to encourage the dissemination of sound and desirable reading matter among the masses of the people of the country at cheap rates, both as to the cost of the books themselves and as to the postage. The question was discussed, unless my memory greatly misleads me, and the legislation was advisedly had. Under this legislation the best classes of literature, for instance, the Waverley Novels, Dickens's works, and the new translation of the Bible, have been sent by publishing houses unbound, stitched, so that they could be sold to the people at ten cents a volume. As a consequence of this you may now find in the homes of our farmers and laboring men throughout the length and breadth of the country in this cheap form, issued at ten cents per volume, a class of literature to which, prior to the

adoption of this policy, some people in very good circumstances could scarcely have access." *Cong. Rec., vol.* 19, *p.* 911.

The result is that after the Department had for sixteen years construed the statute to mean what the appellants say it plainly means, and after Congress had uniformly refused, upon full investigation, to comply with the requests of Postmasters General to so amend the statute that it could be interpreted as the Government now insists it should always have been interpreted, the Post Office Department ruled, on May 5th 1902, that the appellants' publications, known as the "Riverside Literature Series," could not go through the mails as second class matter. This ruling was made notwithstanding a Post Office official, having power to act in the premises, had issued to the appellants a certificate declaring that the "Riverside Literature Series" had been determined by the Third Assistant Postmaster General to be a publication entitled to admission into the mails as second class matter.

Thus, by a mere order of the Department that has been accomplished which different Postmasters General had held could not be accomplished otherwise than by a change in the language of the statute itself, which change, as we have said, Congress deliberately refused to make after hearing all parties concerned and after extended debate in each House.

It has long been the established doctrine of this court that the practice of an Executive Department through a series of years should not be overthrown, unless such practice was obviously and clearly forbidden by the language of the statute under which it proceeded. In *United States* v. *Finnell*, 185 *U. S.* 236, 244, which case related to certain fees claimed by a clerk of a court of the United States, this court said: "It thus appears that the Government has for many years construed the statute of 1887 as meaning what we have said it may fairly be interpreted to mean, and has settled and closed the accounts of clerks upon the basis of such construction. If the construction thus acted upon by accounting officers for so many years should be overthrown, we apprehend that much confusion might arise. Of course, if the departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the court to so adjudge. *United States* v. *Graham*, 110 *U. S.* 219; *Wisconsin C. R'd Co.* v. *United States*, 164 *U. S.* 190. But if there simply be doubt as to the soundness of that construction—and that is the utmost that can be asserted by the Government—the action during many years of the department charged with the execution of the statute should be respected, and not overruled except for cogent reasons. *Edwards* v. *Darby*, 12 *Wheat.* 206, 210; *United States* v. *Philbrick*, 120 *U. S.* 52, 59; *United States* v. *Johnston*, 124 *U. S.* 236, 253; *United States* v. *Alabama G. S. R'd Co.*, 142 *U. S.* 615, 621. Congress can enact such legislation as may be neces-

sary to change the existing practice, if it deems that course conducive to the public interests."

In our judgment, the appellants properly construe the statute. We think it obviously means just what the Department held it to mean for more than sixteen years. But the very utmost that the Government can claim is that the statute in question is doubtful in its meaning and scope. The rule in such a case is not to disturb the long-continued practice of the Department in its execution of a statute, leaving to Congress to change it, when the public interests require that to be done. But the Department, after being informed repeatedly by Congress that the change asked by Postmasters General would not be made, concluded to effect the change by a mere order that would make the statute mean what the practice of sixteen years, and the repeated action of Congress had practically said it did not mean and was never intended to mean. This is a mode of amending and making laws which ought not to be encouraged or approved.

It is suggested that the ruling of the Department was changed because of the increased expense attending the carrying, as second class mailable matter, of such publications as those of the appellants. But how could the fact of such expense justify a change in the settled construction of a statute? That was a matter to which the attention of Congress was specially and frequently called, and yet it refused to modify the language of the statute. It was not the function of the Postmaster General to sit in judgment on the policy of legislation and to determine the extent to which Congress should authorize the expenditure of public moneys. The question of expense was entirely for the legislative branch of the government.

Something has also been said as to the discretion committed to the Post Office Department in determining what is and what is not second class mailable matter. But what about the discretion with which previous Postmasters General had been invested, when for many years they uniformily held that such publications as the plaintiffs' were second class mailable matter? Is the discretion of one Postmaster General to be deemed of more importance than the discretion of five of his predecessors in office?

In our opinion the law is for the appellants, and it should have been so adjudged.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 373.—October Term, 1903.

Bates & Guild Co., Appellants, vs. Henry C. Payne, Postmaster General. } On appeal from the Court of Appeals of the District of Columbia.

[April 11, 1904.]

This was a bill to compel the recognition by the Postmaster General of the right of the plaintiff corporation to have a periodical publication, known as "Masters in Music," received and transmitted through the mails as matter of the second class, and to enjoin defendant from enforcing an order, theretofore made by him, denying it entry as such. This case took the same course as the preceding ones. (31 Wash. L. Rep. 395.)

Mr. Justice Brown delivered the opinion of the Court.

The first number of Masters in Music was issued in January, 1903, and an application was immediately made to the Postmaster General for its admission to the mails as second class mail matter. The application was denied, and plaintiff immediately, and before the issue of another number, filed this bill. The publication purports to be a "monthly magazine," salable at twenty cents per number, and to subscribers at two dollars a year. The first number is devoted to the works of Mozart and contains a portrait, a biography of four pages, an essay of ten pages upon his art and thirty-two pages of his music. The preliminary page contained a notice to the effect that "Masters in Music will be unlike any other musical magazine. Each monthly issue, complete in itself, will be devoted to one of the world's great musicians, giving thirty-two pages of engraved piano music, which will comprise those compositions or movements that represent the composer at his best, with editorial notes suggesting the proper interpretation; a beautiful frontispiece portrait, a life, and estimates of his genius and place in art, chosen from the writings of the most eminent musical critics. The text will thus constitute an interesting and authoritative monthly lesson in musical history; its selections of music will form a library of the world's musical masterpieces, and all at slight cost. . . . The announcement of the contents of the February issue, which will treat of Chopin, will be found on another page."

The Postmaster General placed his refusal to allow this magazine to be transmitted as second class mail matter upon the ground that each number

was complete in itself; had no connection with other numbers save in the circumstance that they all treated of masters in music, and that these issues were in fact sheet music disguised as a periodical, and should be classified as third class mail matter.

Conceding the principle established in the two cases just decided to be that the fact that books published at stated intervals and in consecutive numbers do not thereby become periodicals, even though in other respects they conform to the requirements of section 14, cases may still arise where the classification of a certain publication may be one of doubt. Such is this case. But we think that, although the question is largely one of law, determined by a comparison of the exhibit with the statute, there is some discretion left in the Postmaster General with respect to the classification of such publications as mail matter, and that the exercise of such discretion ought not to be interfered with unless the court be clearly of opinion that it was wrong. The Postmaster General is charged with the duty of examining these publications and of determining to which class of mail matter they properly belong; and we think his decision should not be made the subject of judicial investigation in every case where one of the parties thereto is dissatisfied. The consequence of a different rule would be that the court might be flooded by appeals of this kind to review the decision of the Postmaster General in every individual instance. In the case of *Magnetic Healing Co.* v. *McAnnulty*, (187 U. S. 94, 104,) the Post Office authorities were held to have acted beyond their authority in rejecting all correspondence with the plaintiff upon the subject of the treatment of diseases by mental action; but while it was said in that case that the question involved was a legal one, it was intimated that something must be left to the discretion of the Postmaster General.

It has long been the settled practice of this court in land cases to treat the findings of the Land Department upon questions of fact as conclusive, although such proceedings involve, to a certain extent, the exercise of judicial power. As was said in *Burfenning* v. *Chicago, St. Paul &c. R. R.*, (163 U. S. 321, 323): "Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined." (Citing cases.) See also *Johnson* v. *Drew*, (171 U. S. 93;) *Gardner* v. *Bonestell*, (180 U. S. 362.)

But there is another class of cases in which the rule is somewhat differently, and perhaps more broadly, stated, and that is, that where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve

questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong. In the early case of *Decatur* v. *Paulding*, (14 Pet. 497,) it was said that the official duties of the head of an executive department, whether imposed by act of Congress or resolution, are not mere ministerial duties; and, as was said by this court in the recent case of *Riverside Oil Co.* v. *Hitchcock*, (190 U. S. 324): "Whether he decided right or wrong was not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever, under these circumstances, to review his determination by mandamus or injunction."

In *Marquez* v. *Frisbie*, (101 U. S. 473,) which was a bill in equity to review the decision of the Land Department in a pre-emption case, Mr. Justice Miller remarked (p. 476): "This means, and it is a sound principal, that where there is a mixed question of law and fact, and the court cannot so separate it as to show clearly where the mistake of law is, the decision of the tribunal to which the law had confided the matter is conclusive." In *Gaines* v. *Thompson*, (7 Wall. 347,) it was held that the court would no more interfere by injunction than by mandamus to control the action of the head of a department; and in *United States ex rel. Dunlap* v. *Black*, (128 U. S. 40,) it was said that the courts will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, no appellate power being given them for that purpose. See also *Redfield* v. *Windom*, (137 U. S. 636.)

The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing.

Upon this principle, and because we thought the question involved one of law rather than of fact, and one of great general importance, we have reviewed the action of the Postmaster General in holding serial novels to be books rather than periodicals; but it is not intended to intimate that in every case hereafter arising the question whether a certain publication shall be considered a book or a periodical shall be reviewed by this court. In such case the decision of the Post Office Department, rendered in the exercise of a reasonable discretion, will be treated as conclusive.

In the case of Masters in Music the question really is whether a pamphlet, complete in itself, treating of the works of a single master, with a greater part of the pamphlet devoted to specimens of his genius, shall be

controlled by the cover, which declared that these numbers will be issued monthly, at a certain subscription price per year. Although a comparison of the exhibit with the statute may raise only a question of law, the action of the Postmaster General may have been, to a certain extent, guided by extraneous information obtained by him, so that the question involved would not be found merely a question of law, but a mixed question of law and fact. While, as already observed, the question is one of doubt, we think the decision of the Postmaster General, who is vested by Congress with the power to exercise his judgment and discretion in the matter, should be accepted as final. The decree of the Court of Appeals is therefore

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 373.—October Term, 1903.

Bates & Guild Co., Appellants, vs. Henry C. Payne, Postmaster General. } On appeal from the Court of Appeals of the District of Columbia.

[April 11th 1904.]

Mr. Justice Harlan (with whom concurred the Chief Justice) dissenting.

The Chief Justice and myself are of opinion that the publication here in question is second class mailable matter, and cannot concur in the opinion and judgment of the court. Our reasons for dissenting are stated in the opinion filed by us in *Houghton* v. *Payne*, just decided.

But there are some things in the opinion of the court in this case to which we shall advert. It is said that the case is one of doubt. Now, it was admitted at the bar by the Government that the publication known as "Masters in Music" would be carried in the mails as second class matter if the question be decided in accordance with the construction placed upon the statute by the Department for more than sixteen years continuously prior to the present ruling of the Department. We had supposed it to be firmly settled that the established practice of an Executive Department charged with the execution of a statute will be respected and followed—especially if it has been long continued—unless such practice rests upon a construction of the statute which is clearly and obviously wrong. In *United States* v. *Philbrick*, 120 *U. S.* 59, which involved the construction placed by an Executive Department upon an act of Congress, this court said: "Since it is not clear that that construction was erroneous, it ought not now to be overturned." So in *United States* v. *Healey*, 160 *U. S.* 145, the court said that it would accept the uniform interpretation by the Interior Department of an act relating to the public lands, "as the true one, if upon examining the statute we found its meaning to be at all doubtful or obscure." The authorities to that effect are numerous. *Edwards* v. *Darby*, 12 *Wheat.* 206; *Hahn* v. *United States*, 107 *U. S.* 402; *United States* v. *Graham*, 110 *U. S.* 219; *Brown* v. *United States*, 113 *U. S.* 371; *United States* v. *Philbrick*, 120 *U. S.* 59; *United States* v. *Johnson*, 124 *U. S.* 236; *United States* v. *Hill*, 120 *U. S.* 183; *Finnell* v. *United States*, 185 *U. S.* 236; *United States* v. *Ala. G. S. R. R. Co.*, 142 *U. S.* 244; *Hewitt* v. *Schultz*, 180 *U. S.* 139,

157. Some of them are cited in the opinion of the court in *Houghton* v. *Payne*. The rule of construction which this court has recognized for more than three-quarters of a century is now overthrown. For, it is adjudged that the practice of the Post Office Department, covering a period of sixteen years and more, need not be regarded in this case, although the construction of the statute in question is admitted to be doubtful. We cannot give our assent to this view.

True copy.

Test:

Clerk Supreme Court, U. S.